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VICARIOUS LIABILITY*

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Under the fault principle as we know it today there are many situations in which *A* is held liable to *C* for damages which *B*'s negligence has caused *C*, even though *A* has been free from negligence or other fault. In such a case *A* is made vicariously liable for *B*'s fault, such liability being imposed because of some relationship between *A* and *B*. In this article we shall examine the bases (in history, in legal reasoning, and in policy) and also the extent of such vicarious liability. Before that is done, however, certain preliminary points should be clarified or emphasized.

In the first place we may treat the fault principle generally as restricting liability to the individual who has himself been in some way at fault.¹ There may be reasons for making innocent *A* pay for *B*'s defaults, but they are no part of a philosophy which rests liability on personal moral shortcoming. That is no doubt part of what Holmes meant in saying he assumed "that common-sense is opposed to making one man pay for another man's wrong, unless he has actually brought the wrong to pass according to the ordinary canons of legal responsibility."²

*A modified version of this Article will appear in a forthcoming textbook on the law of torts by Professor Fowler V. Harper and the present author.

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¹One man may, of course, voluntarily agree to be bound by another's liability (as an insurance company will, for a price) but no such voluntary agreement to be liable is found in the typical case of vicarious liability. The relationship which entails it may be entered into by free choice, but given the requisite relationship, vicarious liability will be imposed even though the parties to it expressly agree to limit their liability to third persons.

²Holmes, Agency, 5 Harv. L. Rev. 1, 14, (1891). Cf. *id.* at 22. Holmes was, to be sure, a great exponent of the objective standard of conduct which he recognized as precluding complete identity between ethical and legal fault in negligence cases. See Holmes, The Common Law 108 (1881). Yet he believed that the ultimate justification of liability in tort rested on the kind of moral consideration stated in the text. See *id.* at c. 3; Jeremiah Smith, Tort & Absolute Liability—Suggested Change in Classification, 30 Harv. L. Rev. 241, 254-5 (1917). Holmes shared the common nineteenth century belief that such a line between liability and non-liability also served expediency. See Holmes, The Common Law, *supra* at 95. But this notion of expediency and this notion of morality were in no way inconsistent with each other. Compare Hofstadter, Social Darwinism in American Thought 1860-1915 (1945) (especially cc. 2, 3, 4).

Another thing to be noted is that *A*'s own wrong may have contributed in some way to the causing of harm to *C* through *B*'s wrongful conduct. *A* may have commanded or procured that very wrong.³ *A* may have been negligent in choosing *B* to do a job which he should have known was over *B*'s head.⁴ *A* may have given *B* poor instructions or faulty equipment.⁵ *A* may have been derelict in failing to stop *B* from doing something obviously dangerous, when he had the chance and the duty to do so.⁶ Or *A* may have failed in his duty to *C* to inspect work that *A* employed *B* to do.⁷ But in these cases, if a causal connection can be traced between *A*'s own wrong and *C*'s injury, there is no need to invoke vicarious liability. The principle which rests liability on individualized fault covers these situations without any fiction, extension or distortion.

Another thing to be borne in mind is that by and large vicarious liability means that *A* (*e.g.*, the employer) alone pays the damages. It is true that vicarious liability on the part of *A* is not necessarily inconsistent with liability on the part of *B*, too. Indeed in the vast majority of cases, both *A* and *B* are theoretically liable under the current law. Yet in the vast majority of cases plaintiff seeks satisfaction from the employer alone.⁸ It is also true that in the typical case *A*, when he has satisfied his vicarious liability for *B*'s wrong, has an action over against *B* for indemnity. Yet again in the vast majority of cases this right to recovery over is purely theoretical and is not pursued.⁹ There are some situations where

³Restatement, Agency § 212 (1933); see also Scope Note to c. 7 which immediately precedes this section; Restatement, Torts § 410 (1934).

⁴Restatement, Agency § 213, comment *d*, and illustrations 2-7; Restatement, Torts § 411. Compare *Louisville Taxicab & Transfer Co. v. Barr*, 307 Ky. 28, 209 S.W.2d 719 (1948) (negligence to select and drive with taxi driver known to be drunk); *Wery v. Seff*, 136 Ohio St. 307, 25 N.E.2d 692 (1940) (entrustment of auto to "immature youngster" is negligence).

⁵Restatement, Agency § 213, comment *c*; see *Coop v. Williamson*, 173 F.2d 313 (6th Cir. 1949) (bad brakes).

⁶*James*, Scope of Duty in Negligence Cases, 47 Northwestern U. L. Rev. 778, 809 (1953); *Harper and Kime*, Duty to Control the Conduct of Another, 43 Yale L.J. 886 (1934).

⁷Restatement, Torts §§ 412, 415 (particularly comment *c*) (1934); Note, 63 Yale L.J. (1954).

⁸Most jurisdictions allow the master and servant to be joined as defendants in a single suit. *Clark*, Code Pleading 385 (2d ed. 1947); *cf.* note, 25 Col. L. Rev. 504 (1925); 46 A.L.R. 1506 (1927) (principal agent). Not infrequently plaintiffs do so join them. As a rule, however, this is *not* done with a view to getting satisfaction (in whole or in part) from (*e.g.*, the employee), but for some purpose ulterior to this. Sometimes, for instance, this is done to defeat the possibility of removal to a federal court (as where the employer is a non-resident, but the employee a resident in the same state as the plaintiff). Sometimes it is done to get the psychological benefit at trial of statements made by the employee which are not admissible against the employer but constitute admissions against the employee himself. In such a case the employer is entitled to a "limiting instruction" (telling the jury not to consider the evidence in determining the master's liability). But practical defendants' lawyers take little comfort from such an instruction.

⁹*Cf.* *James*, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 556-7 (1948).

original damages or indemnity are likely to be pursued against *B* (the "wrongdoer") but most of these fall within the independent contractor category wherein the courts are least likely to impose vicarious liability on *A*.¹⁰

The fact that the ultimate onus of vicarious liability rests in practice on the employer is a good thing from several points of view. If it were passed on to the negligent workman, that would be a blow to him as crushing (financially) as the original injury was to the victim, and would have like tendency to pauperize him and his family. Employees are ill equipped to provide for the distribution of such losses through liability insurance or otherwise and do not in fact do so.¹¹ The whole structure of our economic and business practices and institutions puts the employer in a better position than the employee to absorb and distribute these costs.¹² This even includes a possible effect on wages of high costs in an industry. Further, from an accident prevention point of view, the pressure of tort liability is more effectively brought to bear on the employer than on the employee. In this context, therefore, accident losses are administered more efficiently in the social interest through employers than they would be through employees.¹³

¹⁰See pages 193 *et seq. infra*. In such cases *A* and *B* are both likely to be employers; and what is *B*'s wrong (as between him and *A*) is more likely to be negligence on the part of his workman than his personal fault. Even here, therefore, the ultimate payment is usually made by a party whose liability is only vicarious.

¹¹A possible exception to this is the case where the employee uses his own car on the job.

¹²Obviously the employer is in a strategic position to take out liability insurance that will cover broadly all the legal liability which the courts subject him to (through the doctrine of *respondeat superior*), or to decide that his own risks are numerous enough to warrant his becoming a self-insurer with respect to them. And in fact he will usually have made such provision, so that if ultimate tort liability rests on the employer, the loss is put into channels for its wide distribution among employers. Moreover, the employer will tend to pass on to the consumers of his product the costs of its production. And he will reckon among such costs what he pays in premiums for liability insurance. This means that by and large the losses caused by the risks of the enterprise will be distributed on a fairly wide and equitable basis among its beneficiaries.

If it be objected that workers in an enterprise are among its beneficiaries, it may be answered that the higher the costs for such items as insurance premiums, the less there is available for direct labor costs (*e.g.*, wages). And this factor often enters into the collective bargaining process. Compare the proposals of the (British) Mineworkers Federation that all industries contribute equally to the cost of workmen's compensation lest the high cost of injury in the hazardous enterprise depress wages therein. See Social Insurance and Allied Services. Report by Sir William Beveridge, CMD No. 6404, ¶ 86 (1942) (hereinafter Beveridge Report).

¹³The fact that the victim's compensation is better assured by resort to the employer's pocketbook is irrelevant here. We are assuming in the discussion at this point that the employer is (vicariously) liable, and are concerned with the ultimate incidence of that liability.

I. BASES IN HISTORY, REASONING AND POLICY

HISTORY

Historians are not agreed on the origins of the modern doctrine of vicarious liability in Anglo-American law. Holmes, for instance, traces it to the primitive law of deodands and noxal surrender — i.e. the surrender by the owner of the offending thing or slave — through the liability under Roman law of *pater familias* for the acts of members of the family and of slaves, and the similar liability imposed by praetorian edict upon innkeepers and shipowners for the torts of their free servants. This liability, imposed “on substantive grounds which have disappeared long since,” came to be described by a fictitious identification between agent and principal — *qui facit per alium facit per se* — a fiction which acquired an independent standing of its own and persisted long after the disappearance of the substantive grounds.¹⁴

Wigmore too found ancient origins for the doctrine, but thought the roots grew in German rather than Roman soil. It was his conclusion that the general view all down the ages had been one of more or less extended vicarious liability, and that this corresponded to the “feeling of justice which every man has.”¹⁵ Wigmore noted some recession of this principle in England between the time of the Conquest and the end of the seventeenth century. During this time liability of the master came to be limited to acts commanded or assented to by him. When the pendulum started to swing the other way in the eighteenth century it was natural for the prevailing rationalization to be in terms of implied command or authority. And while this has given way to the scope of employment test, occasional rulings today trace back to this earlier notion as we shall see.

Holdsworth found that after an early period of strict liability of masters for the acts of their slaves, the medieval period was marked by (1) the general principle that the master was liable only for his own acts or acts of the servant which he commanded

¹⁴Holmes felt that the “fundamental theory of agency” rested on this outworn fiction and was opposed to common sense. The outline of modern law was to him “the resultant of a conflict between logic and good sense—the one striving to carry fictions out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.” Holmes, Agency, 4 Harv. L. Rev. 345 (1891), 5 *id.* 1 (1892). The quotation in the text appears in 5 *id.* at 14.

¹⁵Wigmore, Responsibility for Tortious Acts, 7 Harv. L. Rev. 315, 383 (1894). Wigmore’s conclusion was also different from that of Holmes, as the quotation in the text (which appears at p. 404, n. 1) suggests. He elaborates this in a note (at pp. 404, 405) in which he states that public convenience and policy demand that a man be deemed to employ a substitute more or less at his peril, and that the limits of this peril did not reflect a conflict between fiction and common sense, but rather “between one great consideration of policy and another.”

and consented to and (2) exceptional rules imposing on the master a legal duty "to avoid certain kinds of acts which were obviously dangerous" to others, and making him liable for such acts on the part of his servant (*e.g.*, duty to keep in one's fire, duties of carriers, and the like). The modern notion started to develop at the end of the seventeenth century because of the "growth of England's industry and commerce, and . . . the fact that the victory of the common law courts over the court of Admiralty had added the new field of mercantile jurisdiction to the common law." The streams of doctrine which fed the new development were "firstly a Roman influence which filtered through the court of Admiralty and mercantile custom, and secondly an English influence derived from the medieval modifications [just mentioned] of the general common law principle governing the master's liability." Like Wigmore, Holdsworth finds the justification of the doctrine rooted in policy.¹⁶

Baty found a lack of any significant ancient roots for vicarious liability and concluded that the doctrine came into English law at the close of the seventeenth century.¹⁷

All agree that the modern phase of the doctrine stems from dicta of Lord Holt. All agree, too, that the test embodied in the doctrine today is whether *B* was acting within the "scope of his employment" for *A* when *B* was negligent.

For present purposes it is not necessary to resolve this conflict among the historians. We may confine ourselves to the question whether the doctrine may be justified by reasoning and policy which has vitality today.

BASES IN LOGIC AND POLICY

Control

The commonest *test* of a relationship to which the law attaches vicarious liability is control or the general right of control.¹⁸ This test is met in the clearest way between master and a servant acting within the scope of his employment, and for convenience we may carry on this part of the discussion in those terms. Now this right of control has been used not only as a test or description but also as a *justification* for imposing vicarious liability where control exists. This is a very different and a more complex proposition,

¹⁶See 2 Holdsworth, *History of English Law* 46, 47 (4th ed. 1936); 3 *id.* at 382-387; 8 *id.* at 472-479.

¹⁷Baty, *Vicarious Liability* (1916).

¹⁸Restatement, Agency § 220 (1). A history of control as a test in this connection may be found in Stevens, *Test of the Employment Relation*, 38 Mich. L. Rev. 188 (1939).

which invites careful analysis. At the outset some of the distinctions already noted call for repetition. Cases where the master has actually exercised control (and commanded the wrongful act) and cases where the master has negligently missed an actual chance to exercise control where he should (as by giving an instruction, or preventing careless conduct in his presence) need not stand on a footing of vicarious liability. They involve the master's own fault. And perhaps because the concept of control is thus easily associated with the master's fault, it became the most popular explanation of vicarious liability in a jurisprudence of torts which was dominated by the fault principle.¹⁹

A secondary factor may have helped this process. The facts concerning the exercise or non-exercise of control by the master would ordinarily be within the knowledge of master and servant and would be relatively inaccessible to plaintiff. A recurring (though by no means universal) principle of evidence²⁰ would therefore warrant relieving plaintiff from the need of proof on this issue. If the substantive law had been genuinely interested in the exercise or non-exercise of control *in this instance*, however, this principle of evidence would have called forth a rebuttable presumption merely, and not a rule of law.²¹

The truth is that neither the fault aspect nor the evidence aspect of the master's right of control explains vicarious liability, for this is imposed, as an everyday matter, in cases where the master has taken all the steps that reasonable foresight would suggest, including those which involve the exercise of control.²² Indeed the court is not even interested in hearing whether the master exercised his right of control well and prudently.²³ If the master had

¹⁹Steffen, *The Independent Contractor and the Good Life*, 2 U. of Chi. L. Rev. 501, 506-7 (1935); Talbot Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222, 1233 (1940).

²⁰Compare, for example, Clark, *Code Pleading* 610 (2d ed. 1947) (burden of proving payment); James, *Proof of the Breach in Negligence Cases*, 37 Va. L. Rev. 179 (1951) (*res ipsa loquitur*); Comment, 31 Tex. L. Rev. 46 (1952) (presumption of negligence by bailee); *Dept. of Water and Power v. Anderson*, 95 F.2d 577 (9th Cir. 1938); *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934) (common law and statutory presumptions of agency from ownership of automobile); *Scott v. Burke*, 39 Cal.2d 388, 247 P.2d 313 (1952) (presumption of care by decedent or one having amnesia); 9 Wigmore, *Evidence* §§ 2508, 2509, 2510, 2510a (3d ed. 1940).

²¹In cases where control is a real issue, defendant may show that he was not negligent in the exercise of it, and thus escape liability in spite of the negligence of the person whose conduct was to be controlled. See note 25 *infra*.

²²See, e.g., cases in notes 49-52, 95, 116-119 *infra*.

²³Weintraub, *Joint Enterprise Doctrine in Automobile Law*, 16 Corn L.Q. 320, 335 (1931) ("Indeed, no court, in holding the master responsible for the negligence of his servant, stops to consider whether the master, by the exercise of his right of control, could have averted the injury."). Cf. Holmes, *The Common Law* 6 (1881).

Thus where the issue is only one of vicarious liability and there is no claim of the master's negligence in choosing or controlling the servant, evidence of the master's care in selecting or attempting to control the servant's conduct

that right, he will be liable if the servant was negligent, even though the master was not on the scene and though his training, selection, equipment, supervision, and operating rules left nothing to be desired.²⁴ The cases in which defendant who has no vicarious responsibility is held for failure to exercise a right of control over the conduct of another person present a marked contrast to the vicarious liability of a fault-free principal.²⁵

would be irrelevant. *Hays v. Millar*, 77 Pa. 238, 241 (1870) (excluding evidence that servants were competent, skilful and careful: "There certainly are cases . . . in which it will be a defence, in an action against a person for damages resulting from the negligence of his servants, to show that he exercised all possible care in their selection: as where he is sued by one servant for the negligence of a fellow-servant, or where it is sought to make him liable for the [negligence] of one employed by him in independent work. These are exceptional cases. A man is responsible for the consequences of the negligence of his servants in the course of their employment, without any regard to their character for care or skill."). Compare *Robinson v. Fitchburg & W. R. Co.*, 73 Mass. (7 Gray) 92, 97 (1856) (admitting similar evidence to rebut a claim that defendant was negligent in hiring an incompetent engineer at low wages, but suggesting "As distinct and substantive proof in defense of the case, we think it would have been liable to the objection . . ."). See also *Atlanta & C.A.L. R. Co. v. Gravitt*, 93 Ga. 369, 382, 20 S.E. 550, 554 (1894); *Bellefontaine and I. R. Co. v. Snyder*, 24 Ohio St. 670, 676 (1874) ("However competent the agent, and however careful and prudent the principal may be in his selection and appointment, the agent acts at the peril of the principal, who stands accountable in law for all the agent's acts and omissions.").

The problem here is to be distinguished from the different question as to whether evidence of the servant's character or habit is admissible to show that the servant himself was probably careful or careless on this occasion. See 1 Wigmore §§ 65, 97. Some of the decisions which exclude such evidence, however, reason that vicarious liability exists without regard to "negligence of the master in employing or retaining an incompetent servant"; so that admission of the evidence may not be justified because of its bearing on the master's own negligence. See, *e.g.*, *Harriman v. Pullman Palace-Car Co.*, 85 Fed. 353 (8th Cir. 1898) ("such evidence is not relevant to the issue [of vicarious liability], and is only admissible in those cases where the master is accused of having knowingly employed an incompetent servant"); *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 446-7, 74 N.W. 166, 168 (1898).

²⁴Notes 22, 23 *supra*. Compare the following statement: "The employer's responsibility for the tortious conduct of his employee extends far beyond his actual or possible control over the conduct of his servant. It rests on the broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while acting in the scope of their employment, *Chase v. New Haven Waste Material Corp.*, 111 Conn. 377, 379, 150 Atl. 107, 68 A.L.R. 1497. . . . Such injuries are one of the risks of the enterprise." *George v. Bekins V. & S. Co.*, 33 Cal.2d 834, 205 P.2d 1037, 1043 (1949), quoting *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5, 7 (1946).

²⁵See, *e.g.*, *Gillespie Grain Co. v. Kuproski* [1935] Can. S.C.R. 13; *Dowler v. Johnson*, 225 N.Y. 39, 121 N.E. 487 (1918) (in determining liability "many circumstances would have to be weighed. Chief among them, perhaps, would be the duration of the offense and the opportunity to restrain it."); *Grant v. Knepper*, 245 N.Y. 158, 156 N.E. 650 (1927) (Negligence may consist in failure "to intervene . . . with protest or command when protest or command would be timely to avert the loss"). Contrast the following cases where liability was withheld because there was no negligent failure to exercise a duty to control: *De Ryss v. New York Cent. R. Co.*, 275 N.Y. 85, 9 N.E. 2d 788 (1937), noted in 36 Mich. L. Rev. 505 (1938); *Rose v. Gisi*, 139 Neb. 593, 298 N.W. 333 (1941); *Dincher v. Great A. & P. Tea Co.*, 356 Pa. 151, 51 A.2d 710 (1947).

In general, see *Harper & Kime, Duty to Control the Conduct of Another*, 43 Yale L.J. 886 (1934); *James, Scope of Duty in Negligence Cases*, 47 North-

What has just been said shows that vicarious liability may not rationally be justified on any theory of the master's personal fault which is worked out through his general right of control. It does not follow, however, that this right of control is altogether irrelevant to the justification of vicarious liability. I suggest that it has some relevance, but that its significance lies not in any connection between control and fault but rather in its bearing on the possibility of accident prevention. There is little doubt that employers of labor are among those strategically placed to promote accident prevention in connection with their operations. This fact has long been recognized by practical men, and recent scientific studies into the human causes of accident have dramatically highlighted it.²⁶ It is also clear that one of the main reasons why the employer is in this strategic position is his general right of control over his employees while they are engaged about his business. This is conceded to be a proper function of management even by those who accept the notion of union recognition.²⁷ Pressure of legal liability on the employer therefore is pressure put in the right place to avoid accidents. This reasoning has nothing to do with fault. It is true of course that liability based on a finding of the master's fault will put pressure on the employer to be careful. But the imposition of strict liability on an employer will exert even greater pressure to prevent accidents and perhaps will often encourage the use of devices or techniques which would not have occurred to the reasonably prudent man had he not been bidden to use his Yankee ingenuity to "achieve the impossible."²⁸ This consideration would tend to justify the master's vicarious liability within the area of his general right of control even where he had done all that reasonable care required in the exercise of it.

western U. L. Rev. 778, 809 *et seq.* (1953); Seavey, *Studies in Agency* 233 *et seq.* (1949).

Compare also note 70 *infra*.

²⁶James & Dickinson, *Accident Proneness and Accident Law*, 63 Harv. L. Rev. 769 (1950). See also Seavey, *Speculations as to Respondeat Superior*, Harvard Legal Essays 433 (1934), reprinted in *Studies in Agency* 129 (1949).

²⁷See, *e.g.*, Teller, *Management Functions under Collective Bargaining* 34-36, 65, 66 (1947).

²⁸Thus employers were spurred on to make the accident proneness studies themselves by the imposition of absolute liability in industrial accidents. And the years that followed workmen's compensation witnessed a spectacular decline in the industrial accident rate. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L.J. 549, 561 (1948).

The spur to safety which strict liability furnishes may be dramatically pointed up by contrasting such liability with the following formulation of the rule of reasonable care: "An employer is not bound to furnish for his workmen the 'safest' machinery, nor to provide the 'best methods' for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer. This is the limit of his responsibility, and the sum total of his duty." *Payne v. Reese*, 100 Pa. 301, 306 (1882).

Choice

Some have found the basis of vicarious liability in the master's power to choose and discharge his servants.²⁹ This lends itself to an analysis parallel to the one we have just made of the matter of control. Here again the master's own fault may be predicated on his negligence in selecting or failing to discharge an incompetent servant where such negligence exists. Here too, however, vicarious liability will be imposed on the master without regard to any such possible negligence—and even where it could be shown not to exist. Here again, the real thrust of the consideration has nothing to do with the master's possible fault but is directed towards accident prevention. The power to hire and fire employees is significant in this connection largely as an implement or adjunct to the master's general right of control.

The master's choice of his servant is sometimes urged as a ground of liability because by exercising that choice he has reposed trust and confidence in the servant and held out to others an invitation to do likewise.³⁰ However significant this consideration might be in contract cases and in tort cases where plaintiff has voluntarily associated himself with defendant (*e.g.*, guest and host, patient and doctor cases), it is altogether beside the point in the great majority of situations where vicarious liability obtains. "The owner of a carriage does not invite the public to use the roads in reliance on the care and skill of his coachman."³¹

Considerations pertaining to the compensation of accident victims and the broad and equitable distribution of their losses

There are other considerations tending to support the principle of vicarious liability which, though they are by no means all the same, tend in modern context to converge in their impingement on the problem. Some of these considerations have been long and often noted. Thus over a century ago Lord Brougham declared "I am liable for what is done for me and under my orders by the man I employ . . . and the *reason* that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."³² In addition to its reference to the popular "control" theory, this statement stresses the risk-creating

²⁹See, *e.g.*, *Quarman v. Burnett*, 6 M. & W. 499, 509 (Ex. 1840); *Kelly v. The Mayor &c. of New York*, 11 N.Y. 432, 436 (1854); *Holmes*, *The Common Law* 6; *Baty*, *Vicarious Liability* 15, 28, c.8 (1916) (neither *Holmes* nor *Baty* was offering this as his own explanation).

³⁰See, *e.g.*, *Hern v. Nichols*, 1 Salk. 289 (N.P. 1709).

³¹*Baty*, *op. cit. supra* note 29, at 11.

³²*Duncan v. Findlater*, 6 Clark & F. 894, 910 (H.L. 1838) (*ital. supp.*).

enterprise (labor being employed in the pursuit of it) and that it was undertaken for the master's benefit or profit. Baty, in his scholarly and provocative diatribe against vicarious liability, concludes (not without petulance): "In hard fact, the reason for the employers' liability is [that] the damages are taken from a deep pocket."³³

In the course of the present century other considerations have been added. Since the advent of the automobile there has been a growing realization that the plight of the uncompensated accident victim presents a grave social problem — without as well as within the field of industrial accidents.³⁴ The matter of compensation to victims therefore has been increasingly recognized by courts, legislatures and the public as a matter of serious social concern transcending individual hardship.³⁵ On the other hand recent studies of the human behavior that causes accidents have shown that very little of it involves the kind of personal moral shortcoming that would justify putting liability upon a person because of his ethical fault.³⁶ And quite apart from these studies, the tendency of juries and even courts for some time has been to find fault more and more easily in order to afford compensation wherever the present concepts could be stretched to allow it.³⁷

³³Baty, *op. cit. supra* note 29, at 154.

³⁴See, *e.g.*, Columbia University Research Council, Report by Committee to Study Compensation for Automobile Accidents (1932); Smith, Lilly, Dowling, Compensation for Automobile Accidents: A Symposium, 32 Col. L. Rev. 785 (1932); Financial Protection for the Motor Accident Victim, 3 Law & Contemp. Prob. No. 4 (1936); Grad, Recent Developments in Automobile Accident Compensation, 50 Col. L. Rev. 300 (1950); James & Law, Compensation for Auto Accident Victims: A Story of Too Little & Too Late, 26 Conn. B.J. 70 (1952); McNiece & Thornton, Automobile Accident Prevention & Compensation, 27 N.Y.U.L. Rev. 585 (1952).

³⁵In addition to authorities cited in note 34 *supra*, see, as illustrative of this statement, *Travelers Mut. Cas. Co. v. Herman*, 116 F.2d 151 (8th Cir. 1940) (which deals with a Kansas statute requiring motor carriers to have liability insurance and cutting off certain defenses of the insurer as against accident victims); *Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681 (1925) (Dealing with compulsory liability insurance for motorists); *Jacobsen v. Dailey*, 228 Minn. 201, 36 N.W.2d 711, 11 A.L.R.2d 1429 (1949) (which discusses the philosophy of owners' consent statutes and judge-made "family-purpose" doctrine); *Merchants & Pl. Bank v. Brigman*, 106 S.C. 362, 91 S.E. 332 (1916) (which upholds a statutory lien on an automobile in favor of its victim, to which a prior mortgage on the car was postponed); N.D. Rev. Code of 1943, cc. 39-16, 39-17 (1949 Supp.) (financial responsibility and unsatisfied judgment fund provisions); N.Y. Insurance Dept., *The Problem of the Uninsured Motorist*, A Report of Dep. Supt. George H. Kline and Sp. Asst. Carl O. Pearson to Supt. Alfred J. Bohlinger (1951), excerpts from which are reprinted in Shulman & James, *Cases & Materials on Torts* 695-699 (2d ed. 1952).

³⁶A description of some of these studies appears in James & Dickinson, note 26 *supra*.

³⁷See, *e.g.*, Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 Law & Contemp. Prob. 476 (1936); Searl, Automobile Liability Law Development & Trend, 39 Best's Ins. News 585 (Fire & Cas. ed. 1938); James, Functions of Judge & Jury in Negligence Cases, 58 Yale L.J. 667 (1949); James & Sigerson, Particularizing Standards of Conduct in Negligence Trials, 5 Vand. L. Rev. 697 (1952).

On the defendants' side, the master's ability to pay and distribute the losses from his enterprise was enhanced and facilitated by the advent of liability insurance just before the turn of the century. The servant remained altogether incapable of satisfying heavy claims against him. And the chances of finding personal fault of the employer were progressively reduced as the corporate form of organization became increasingly popular — a corporation cannot be personally negligent.

The social problem on which all these and other factors converge lends itself to more than one possible solution. The broadest would be a comprehensive form of social insurance for all sorts of bodily ills and incapacities (including those from accident), financed from general taxation.³⁸ This would assure a measure of compensation to accident victims (as well as others) and — at least if taxation were progressive — would tap the deep pocket of him who benefitted most from the social system. Such a solution would require legislation and perhaps constitutional changes; it does not seem to be forecast by existing American patterns.

A different solution — also statutory — is the type of enterprise liability represented by workmen's compensation, which in many of our states leaves much room for private enterprise in the process of loss distribution. Within its sphere this too provides a measure of compensation tailored to need and not to fault, and provides effective means for distributing accident losses among the beneficiaries of the enterprise that created the risks that caused the losses.³⁹ No one now claims that the burden of this system on

³⁸See, e.g., the description of the New Zealand system in 1 Larson, *Workmen's Compensation Law* 14 *et seq.* (1952). Chapter 1 of this work contains an excellent treatment of the nature of workmen's compensation, contrasting it with tort liability on the one hand and other types of social insurance, on the other hand.

³⁹Larson lists among typical features of workmen's compensation the following:

"(a) the basic operating principle is that an employee is automatically entitled to certain benefits whenever he suffers a 'personal injury by accident arising out of and in the course of employment'; (b) negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his liability and in the sense that the employer's complete freedom from fault does not lessen his liability; (c) coverage is limited to persons having the status of employee, as distinguished from independent contractor; (d) benefits to the employee include cash wage benefits, usually around one-half to two-thirds of his average weekly wage, and hospital and medical expenses; in death cases benefits for dependents are provided; arbitrary maximum and minimum limits are ordinarily imposed; . . . and (h) the employer is required to secure his liability through private insurance, state fund insurance in some states, or 'self-insurance'; thus the burden of compensation liability does not remain upon the employer but passes to the consumer, since compensation premiums, as part of the cost of production, will be reflected in the price of the product."

Larson, *op. cit. supra* note 38, at 1, 2.

industry has put an unreasonable brake on industrial expansion and production.⁴⁰

In the rest of the accident field there has been a typical common law development which is gradually imposing a similar liability on enterprises for the risks they inject into our society. This movement has not openly repudiated the requirement of fault, but has diluted it. And by fictions and procedural devices it has subordinated fault to the need for compensation supported by enterprise liability.⁴¹ Vicarious liability is one of the cornerstones of this newer structure. It does not relieve plaintiff from the need to show fault, but it is satisfied with a showing of the *servant's* fault. As to the master it is a form of strict liability based on the same philosophy as workmen's compensation and involving similar assurance that claims will be paid and widely distributed.⁴² Given our present set of social values (or variations that are likely to occur within their general framework) and our present social and economic institutions, the fundamental principle of agency seems fully justified because (a) it supplies an effective spur towards accident prevention; (b) it tends to provide greater assurance of compensation for accident victims, and (c) at the same time it tends to provide reasonable assurance that like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprises that entail them.⁴³ Furthermore, there is no indication that the existing system (which includes vicarious liability) has unduly retarded business and industrial development.

The foreseeable future seems to hold no prospect for a serious reversal of the trend towards enterprise liability. This does not mean however that vicarious liability will or should be expanded without limit. Like all other liability, tort liability puts a burden on enterprise and it does not entirely dispose of that fact to point out that enterprise passes its cost burdens on to those who consume its products. This process is neither complete nor uniform in all cases. The competitive position of some classes of enterprise may

⁴⁰*Cf.* James & Dickinson, *loc. cit. supra* note 26, at 781, 782.

⁴¹See, e.g., citations in note 37 *supra*; Leflar, Negligence in Name Only, 27 N.Y.U.L. Rev. 564 (1952); Feezer, A Circle Tour through Negligence, 27 N.Y.U.L. Rev. 647 (1952); Ehrenzweig, Negligence Without Fault (1951).

⁴²See Kohlman v. Hyland, 54 N.D. 710, 210 N.W. 643 (1926); Carroll v. Beard-Laney, Inc., 207 S.C. 339, 35 S.E.2d 425 (1945); Wigmore, note 15 *supra*; Laski, Basis of Vicarious Liability, 26 Yale L.J. 105 (1916); Young B. Smith, Frolic and Detour, 23 Col. L. Rev. 444, 716 (1923); Douglas, Vicarious Liability and Administration of Risk, 38 Yale L.J. 584, 720 (1929); authorities cited in note 144 *infra*.

With this point of view, contrast that of Holmes, note 14 *supra*, and Baty, note 17 *supra*.

⁴³The beneficiaries of enterprise include not only the entrepreneurs who profit by it, but ultimately all who are employed by it or who use, directly or indirectly, its products or services. Compare notes 12 and 39 *supra*.

make them poorer vehicles for passing costs to others than are competing classes. Railroads, for instance, compete with bus, truck, water, and air lines. From the fact of competition it by no means follows that each type of industry is equally able to absorb and distribute an extra cost item. Moreover, within a single industry there will be marginal units, so far as their ability to handle additional costs goes, and this in turn may be due to bad safety records, or to general high cost of production or of sales, or to a combination of factors. The repercussions of added costs are not confined to the economic consequences to the enterprise itself. They may include consequences for labor and for the whole community. The problem is delicate and complex. Perhaps courts are not well equipped to gather and to weigh all these manifold facts. But a recognition of their relevance points up the need to get all the light on them that is practicable, and indicates the necessity for taking pains to work out the allocation of tort burdens among industries, and among enterprises within an industry, in such a way as best to serve prevailing notions of fairness and expediency. The latter will include notions of deterrences and also those which would favor or burden certain types of enterprises because of some extrinsic policy.⁴⁴ It remains to consider the extent to which existing rules and limitations serve these ends.

II. MASTER AND SERVANT

SCOPE OF EMPLOYMENT

The clearest case of vicarious liability is that of a master for harm caused by acts of his servant. A servant is a person employed by his master to perform service for him in his affairs with the retention by the master of control, or right of control, over the physical details of the service.⁴⁵ Servants include most people who are called employees in common parlance today, but there is a distinction (which we shall note later) between servants and independent contractors. No free man, however, is a servant all the time⁴⁶ — not even when, for payroll purposes, he is on the job — and the master's liability extends only to those acts which are regarded as done within the scope of the servant's employment. This phrase then spells one of the limits (perhaps the most important one) on vicarious liability and deserves careful analysis.

⁴⁴Take, for example, the case of the extra-hazardous — but useful — enterprise. If it is made to pay for all the losses it causes, this may tend to depress wages in the industry, or to put it at a disadvantage with foreign competition. See 1 Larson, *Workmen's Compensation Law* § 320 (1952); discussion in *Beveridge Report*, ¶ 86-89.

⁴⁵Restatement, *Agency* § 220.

⁴⁶Holmes, *Agency* II, 5 *Harv. L. Rev.* 1, 16 (1892).

Acts done in furtherance of the assigned task

We are concerned here with cases in which the tortious act itself is done in furtherance of the assigned task. Obviously when the conduct that harms plaintiff is the very thing the servant is employed to do, it falls within the scope of the latter's employment.

But vicarious liability is much broader than that.⁴⁷ Masters seldom employ or direct servants to be negligent. "The mere fact that [the servant] is not employed to be negligent does not at all mean that such tortious acts are outside the scope or course of his employment."⁴⁸ If then the servant is engaged in performing what he is hired to do — such as driving the master's truck on the assigned errand — the master is liable for the servant's negligence in the manner of carrying out that performance. This is so even if the servant's conduct consists in acts or omissions which have been specifically forbidden,⁴⁹ such as selling cartridges to a minor⁵⁰ or performing the job while intoxicated,⁵¹ or using violence to eject trespassers.⁵² And it includes the use by the servant of a forbidden means or instrumentality in carrying out his assigned task, at least where the means chosen fall within the range of what the master might reasonably expect the servant to use. So where a telegraph messenger boy who was supposed to use a bicycle for his deliveries used a forbidden kind of bicycle (racing type) the master was held liable in *Rankin v. Western Union Telegraph Co.*⁵³ The Court distinguished cases where the servant had chosen a mode of conveyance totally different from that authorized.⁵⁴

⁴⁷Indeed, as we have seen (p. 162 *supra*) no principle of vicarious liability is needed to hold the master for the very conduct he has directed his servant to perform.

⁴⁸*Sears, Roebuck & Co. v. Creekmore*, 199 Miss. 48, 23 So.2d 250, 251 (1945).

⁴⁹The leading case is *Limpus v. London General Omnibus Co.*, 1 H. & C. 526 (Ex. 1862). The proposition is now scarcely subject to doubt on either side of the Atlantic. See Salmond, *Law of Torts* 92, 93 (10th ed., 1945); Harper, *Law of Torts* § 291 (1933); Prosser, *Torts* 476 (1941); Restatement, Agency §§ 230, 233, 234; West Pub. Co., *Decennial Digests, Master & Servant*, 302 (1) b.

⁵⁰*Mantino v. Piercedale Supply Co.*, 338 Pa. 435, 13 A.2d 51 (1940).

⁵¹*Central Trucking System v. Moore*, 304 Ky. 533, 201 S.W.2d 725 (1947); *Carroll v. Beard-Laney, Inc.*, 207 S.C. 339, 35 S.E.2d 425 (1945).

⁵²See *Fanciullo v. B.G. & S. Theatre Corp.*, 297 Mass. 44, 8 N.E.2d 174 (1937); *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 180 P.2d 252 (1947); Restatement, Agency § 245.

⁵³147 Neb. 411, 23 N.W.2d 676 (1946).

⁵⁴"The rule is consistent with the adjudicated cases which Western Union discusses and relies upon in its brief. In *Miller v. Western Union Telegraph Co.*, 63 Ohio App. 125, 25 N.E. 2d 466; *Western Union Telegraph Co. v. Hinson*, 191 Ark. 617, 87 S.W.2d 66; *Hughes v. Western Union Telegraph Corporation*, 211 Iowa 1391, 236 N.W. 8; and *St. Louis-San Francisco Ry. Co. v. Robbins*, 219 Ala. 627, 123 So. 12, the employee was authorized to use a bicycle; he used an automobile without authority. In *Blackman v. Atlantic City & Shore R. Co.*, 126 N.J.L. 458, 19 A.2d 807, the employee was authorized to use trolley transportation; he used an automobile. In *Wilson v. Pennsylvania R. Co.*, 63 N.J.L. 385, 43 A. 894, the employee was authorized to carry mail on

The distinction between the *Rankin* case and those cited by the Court therein, poses a problem that is central to this whole field of inquiry. The distinction may be justified upon a notion that the master will be held for unauthorized acts only if they are reasonably foreseeable.⁵⁵ But foreseeability here is an ambiguous word. In one sense the term has become inextricably interwoven with the fault of negligence. The law of negligence requires a man to take reasonable precautions to avoid the reasonably foreseeable (and undue) risks from specific acts or omissions or a specific line of conduct. The risks reasonably to be foreseen from assigning a given task to a specific unskilled individual would, for example, be relevant in determining whether the master is negligent in making the assignment. Even here, as we have seen elsewhere,⁵⁶ foreseeability is an expanding concept. But this kind of inquiry should not be involved where the question is one of vicarious liability. We are not here looking for the master's fault but rather for risks that may fairly be regarded as typical of or broadly incidental to the enterprise he has undertaken.⁵⁷ Now one of the purposes for such a quest is to mark out in a broad way the extent of tort liability (as a cost item) that it is fair and expedient to require people to expect when they engage in such an enterprise, so there can be some reasonable basis for calculating this cost. And while many things may enter into the matters of fairness and expediency

foot or by push cart; he used a wagon. In *Lambert v. M. Satsky Trucking Co.*, 118 N.J.L. 485, 193 A. 702, drivers were instructed to use only company trucks in making deliveries, as the master's insurance covered only those trucks; the driver used his personally owned sedan. In *Kennedy v. Union Charcoal & Chemical Co.*, 156 Tenn. 666, 4 S.W.2d 354, 57 A.L.R. 733, the employee used an automobile instead of a wheelbarrow or going on foot. Obviously, in the cited cases a substantially different kind of instrumentality was used."

⁵⁵The cases cited in note 54 *supra*, do not proceed upon any such basis but rather upon the ground that the servant had no express or implied authority to use the injuring vehicle. This reasoning, however, would equally exclude liability in the *Rankin* case, unless authority is to be "implied" in the face of facts showing that both master and servant knew this vehicle had been forbidden. An "implication" of this kind is no more nor less than the imposition of liability without regard to the consent or intentions of the parties. Since it cannot be justified, as against the master by his consent or authorization, this liability is sometimes justified on the ground that some disobedience by employees is foreseeable in the course of a business, and that it is fair to saddle the employer with the losses from such foreseeable deviations from duty. See, *e.g.*, *Smith, Frolic and Detours*, 23 Col. L. Rev. 444, 716 (1923) (particularly 720 *et seq.*); *Restatement, Agency* §§ 228, 229, particularly § 229(f) and comment *a* (1933). *But cf.* *Douglas, Vicarious Liability & Administration of Risk*, 38 Yale L.J. 584, 591 (1929).

⁵⁶I have tried to examine foreseeability as employed in the concept of negligence in, *e.g.*, *Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 1 (1951); *Nature of Negligence*, 3 Utah L. Rev. 275 (1953). Compare also *Scope of Duty in Negligence Cases*, 47 Northwestern U.L. Rev. 778 (1953); *James and Perry, Legal Cause*, 60 Yale L.J. 761 (1951); *Prosser, Palsgraf Revisited*, 52 Mich. L. Rev. 1 (1953), and authorities cited n. 3 thereof.

⁵⁷See the valuable treatment of this notion in *Ehrenzweig, Negligence Without Fault* (1951).

besides what men at any given point of time may reasonably expect, and while expectations themselves vary with changing needs and circumstances, yet fairness probably cannot be altogether divorced from some kind of foreseeability. What is reasonably foreseeable in this context, however, is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence. In the first place, we are no longer dealing with specific conduct but with the broad scope of a whole enterprise.⁵⁸ Further, we are not looking for that which can and should reasonably be avoided, but with the more or less inevitable toll of a lawful enterprise. The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long run activity in spite of all reasonable precautions on his own part.⁵⁹ The proper test here bears far more re-

⁵⁸Compare *Morris*, Torts of An Independent Contractor, 29 Ill. L. Rev. 339, 351 (1934); *Smith*, Collateral Negligence, 25 Minn. L. Rev. 399, 418-419 (1941) (contrasting the broad view of foreseeability which is taken to determine whether a project is so dangerous that liability for it cannot be avoided by contracting it out, with the foreseeability concerning specific acts that is so critical in deciding questions of negligence).

⁵⁹This distinction has been perceived and followed in some recent cases where a servant assaults plaintiff, not in any way to further his master's business but in the course of a quarrel engendered by conduct in the course of employment. Thus in a recent California case, *Fields v. Sanders*, 29 Cal.2d 834, 180 P.2d 684 (1947), defendant's driver struck plaintiff with a wrench in an altercation that arose out of a traffic accident between defendant's truck and plaintiff's car. The court pointed out that association between the driver and other men of the highway and the friction that such associations might induce in fallible human beings together with the conduct which the friction might lead to were all "risk[s] of the business." The court continued:

"Nor is it of any consequence that 'the employer here could not expect that the wrench would be used [by Sanders] as a club' to beat plaintiff. Neither could the employer in the recent case of *Carr v. Wm. C. Crowell Co.*, *supra*, 28 Cal. 2d 652, 171 P.2d 5, be deemed to have expected that a hammer, furnished as a working tool to his carpenter, would be hurled at another employee in the course of a dispute, striking and injuring him. Yet such circumstances of use of the instrument did not relieve the employer from responsibility for the wrongful act of his employee."

The approach of the *Sanders* case is noted and approved in 28 Ore. L. Rev. 83 (1948). See also *George V. Bekins Van & S. Co.*, 33 Cal.2d 834, 205 P.2d 1037, 1043 (1949). It is significant that the California court in all three cases quite consciously cited compensation and third-party-liability cases indiscriminately, as presenting the same problems. *Cf. Kohlman v. Hyland*, 54 N.D. 710, 210 N.W. 643 (1926), a third-party-liability case in which the court justified *respondeat superior* on the following grounds:

"We have heretofore said that the underlying philosophy of the Workmen's Compensation Act is that industry, not the individual, shall bear the risk of injury to the laborers engaged therein. *Altman v. Comp. Bur.*, 50 N.D. 215, 195 N.W. 287. There is always present the possibility of injury to employees, notwithstanding every conceivable precaution may be taken to guard against it. So it is when we look at the situation from the viewpoint of the public. There is an ever-present probability that third persons will suffer injury because somebody's servant is careless, disobedient, or unfaithful to his master. This is a real, not an imaginary risk, to which bear abundant witness the development of the doctrine of *respondeat superior* and the myriad cases where courts have been lost in the mazes of metaphysical refinement in definition between frolic and detour. This latter risk to the public is clearly one which industry, on the analogy of the Compensation Acts, may well be required to carry, within reasonable bounds. He who employs a servant and puts under

semblance to that which limits liability for workmen's compensation than to the test for negligence. The employer should be held to expect risks, to the public also, which arise "out of and in the course of" his employment of labor.

Viewed in this perspective, the master should seldom indeed be exonerated when his affairs are being furthered by the use of an unauthorized vehicle.⁶⁰

A similar problem is presented by the oft-recurring case of the unauthorized⁶¹ person permitted by the servant to drive the master's vehicle (while being used in the latter's service). If the servant was himself careless in turning the driving over to an incompetent substitute or one whose driving was an unknown quantity,⁶² or if the servant remained present and was negligent in failing to exercise control,⁶³ the master will be held for that negligence of

his control an automobile must know, as every one knows, that it is not improbable that he will, on occasion, depart from strict instructions."

See also *Carroll v. Beard-Laney, Inc.*, 207 S.C. 339, 35 S.E.2d 425 (1945); Restatement, Agency § 229 comment *a* (1933).

In workmen's compensation cases the tendency has been increasingly to discard narrow notions of foreseeability in determining whether an injury arose out of and in the course of employment. See, *e.g.*, *Burns v. Merritt Eng. Co.*, 302 N.Y. 131, 135, 96 N.E.2d 739, 741 (1951) ("The test is whether the injurious horseplay may reasonably be regarded as an incident of the employment . . . rather than the foreseeability of a particular prank.") Compare analysis in the leading cases of *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920) (*Cardozo, J.*), and *Hartford Acc. & Ind. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940) (*Rutledge, J.*); *cf.* *Horovitz, Assaults and Horseplay under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311 (1946); notes, 34 Cornell L.Q. 460 (1949); 1 Buffalo L. Rev. 74 (1951); 1 Larson, *Workmen's Compensation Law* § 23 (1952); *cf.* note 90 *infra*.

⁶⁰*Canadian Pac. R. Co. v. Lockhart* [1942] A.C. 591 (P.C.); *Salmond, Law of Torts* 93 (10th ed. 1945); see *Frenyea v. Maine Steel Prods. Co.*, 132 Me. 271, 170 Atl. 515, 517 (1934) ("Nor can the plaintiff be denied a recovery because the defendant's servant used a means for transporting its deflectors which it had not intended or contemplated. When the collision occurred, the road mechanic was using the truck not for his own purposes . . . but to perform a part of the service which he had been directed to render." The use of the vehicle here had not been forbidden).

⁶¹If the servant was authorized to use a substitute, the master would be vicariously liable for the substitute's negligence without any question. *Haluptzok v. Great No. R. Co.*, 55 Minn. 446, 57 N.W. 144 (1893); cases collected in note, 134 A.L.R. 974 (1941). But if there is no express or implied in fact authority, the courts treat the substitution as though forbidden and the problem arises. See, *e.g.*, *Pearce, Young, Angel Co. v. Ward*, 72 Ga. App. 89, 33 S.E.2d 39 (1945) (holding also that there is no presumption of such authority); *Buisson v. Potts*, 180 La. 330, 156 So. 408 (1934); Restatement, Agency §§ 77-81.

⁶²As in *Grant v. Knepper*, 245 N.Y. 158, 156 N.E. 650 (1927); *Potter v. Golden Rule Grocery Co.*, 169 Tenn. 240, 84 S.W.2d 364 (1935); *Hall v. McDonald*, 229 Wis. 472, 282 N.W. 561 (1938); *cf.* Restatement, Agency § 241, comment *c*. On the subject of this and the following notes, see notes, 44 A.L.R. 1382 (1926); 54 A.L.R. 851 (1928); 98 A.L.R. 851 (1928); 98 A.L.R. 1043 (1935); 134 A.L.R. 974 (1941).

⁶³As in *Gillespie Grain Co. v. Kuproski* [1935] Can. S.C.R. 13; *Cohen v. Whiteman*, 75 Ga. App. 286, 43 S.E.2d 184 (1947) (servant's "control, authority and direction" alleged. Held sufficient on demurrer); *Grant v. Knepper*, note 62 *supra*; *Eagon v. Woolard*, 122 W. Va. 565, 11 S.E.2d 257 (1940) (similar to *Cohen* case, *supra*); *cf.* note 25 *supra*, and note 70 *infra*; Restatement, Agency § 241, comment *e*.

his own servant. Many cases, however, refuse to hold the master for the casual negligence of the unauthorized but presumptively careful substitute.⁶⁴ The technical reasoning is that the servant — though disobedient towards his master — has not been negligent towards plaintiff, while the substitute — though negligent towards plaintiff — is not a servant as to the master.⁶⁵ A broader consideration has also been urged: if the master is to be held for the wrongs of his servants, however careful he is in selecting them, "he should certainly have the exclusive right to determine who they shall be."⁶⁶ But this result is anomalous in terms of common sense. The master's business is being carried out, and in a way that exposes him to risks no greater, no less foreseeable, and no more foreign to his enterprise than does many another forbidden manner of trying to further his affairs. Indeed the risks are less where the unauthorized driver is careful than where the servant should know he is incompetent. The logical difficulty comes from sticking too closely to a supposed necessity for finding fault on the master's own part or for tracing the driver's fault to him through some kind of fictitious authority. This insistence in turn traces back to the once current notion that implied authority or command by the master was the true basis of liability; it represents a failure to realize the full implications of the philosophical basis for vicarious liability. This (though it insists in a sense on fault) puts on the employer the risks of all those faults which may fairly be regarded as incidental to his enterprise. His personal fault or innocence is beside the point; and so are the limits upon his consent or authorization, save possibly insofar as he may in reason expect those limits to be observed in fact. If he should know that he cannot make limitations practically effective, the risk of their violation should be borne by the enterprise that creates this risk and not thrown on the innocent victim. This is how the law treats limitations on the manner of doing work and on the time and place where the ser-

⁶⁴*Pearce, Young, Angel Co. v. Ward*, 72 Ga. App. 89, 33 S.E.2d 39 (1945) (servant in truck with substitute); *Butler v. Mechanics Iron F. Co.*, 259 Mass. 560, 156 N.E. 720 (1927) (same); *Rose v. Gisi*, 139 Neb. 593, 298 N.W. 333 (1941) (same); *Buisson v. Potts*, 180 La. 330, 156 So. 408 (1934) (servant not in car with substitute); *Paul v. Benavidez*, 56 N.M. 328, 243 P.2d 1018 (1952) (same). See cases collected in A.L.R. notes cited in note 62 *supra*.

In the last two cases cited, it was suggested that the result might be different if the servant had been in the car. *Cf.* also *Griffith v. Fannin*, 306 Ky. 279, 206 S.W.2d 965 (1947) with *Thixton v. Palmer*, 210 Ky. 338, 276 S.W. 971 (1925). This alone would make no difference under the rule adopted in Restatement, Agency § 241, unless the servant was negligent in exercising his duty of supervising the driver's conduct. See also *Potter v. Golden Rule Grocery Co.*, note 62 *supra*. Compare notes 25, 63 *supra*, and note 70 *infra*.

⁶⁵Seavey suggests that the substitute may be the servant's servant. *Studies in Agency* 237 (1949). *But cf.* *Rose v. Gisi*, 139 Neb. 593, 298 N.W. 333 (1941). But if this were true, it would usually be cold comfort to the plaintiff.

⁶⁶*Haluptzok v. Great No. R. Co.*, 55 Minn. 446, 448, 57 N.W. 144, 145 (1893); *Potter v. Golden Rule Grocery Co.*, 169 Tenn. 240, 245, 84 S.W.2d 364, 366 (1935).

vant is to use the master's instrumentalities.⁶⁷ There seems no reason — in terms of the vital policy behind vicarious liability — for treating the servant's authority to use substitutes any differently. In terms of legal doctrine, the servant should be recognized as having an unprivileged power to employ an assistant or substitute in the circumstances described above.⁶⁸ Or if the misleading word "authority" (and its derivatives) is to be used as a *test* in this context, it should be recognized that authorization should be measured *objectively* (so as to correspond with the limits of the social policy behind imposing vicarious liability) and not in terms of the employer's wish to limit his own liability.⁶⁹

Judicial authority for the position in the text is scanty, but many courts have broadly imposed liability on the master whose servant is present in the vehicle, by making the servant's duty to control the driver virtually absolute, thus in effect identifying servant and substitute.⁷⁰ If the servant's own faulty operation is

⁶⁷See, *e.g.*, notes 49-52 *supra*; Restatement, Agency §§ 230, 233 especially comment b, § 234, comment a.

⁶⁸This is in effect the decision in *Emison v. Wyland Ice Cream Co.*, 215 Ala. 504, 111 So. 216 (1927).

The concept of unprivileged power is elaborated in Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16 (1913).

⁶⁹Thus Talbot Smith, in noting that an employer may farm out part of his enterprise (by devices like the independent contract), points out that the courts will usually respect this intent to limit one's liability—though the power is shrinking—and adds "As to 'scope of employment' it has vanished. The employer is powerless to remove any given act, although he fears it as a liability-producer, provided only that it is within the servant's normal scope of employment." Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222, 1252 (1940).

⁷⁰This result is not clearly spelled out in the cases, but seems to be a fair inference from their (often ambiguous) reasoning and their holdings. We have seen that the person having charge of a vehicle (*e.g.*, as owner or custodian) usually retains the duty of care, as long as he remains present in the vehicle, to control the operation of it by another. Harper and Kime, *Duty to Control The Conduct of Another*, 43 Yale L.J. 886 (1934); *cf.* note 25 *supra*. In strict theory, the basis of the custodian's liability is his own failure to perform that duty. To show such failure, plaintiff would logically have to show that the custodian had a reasonable and actual opportunity "to prevent the driver from being negligent"; and that he omitted to take reasonable steps towards that end. Harper and Kime, *supra*, at p. 889; Seavey, *Studies in Agency* 223 *et seq.* (1949); *cf.* cases, note 25 *supra*. For a long time, however, there has been a marked judicial tendency to slide over this requirement and to identify the owner or custodian with the person driving in his presence. *Booth v. Mister*, 7 C.&P. 66 (N.P. 1835) ("As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant held them himself."); *Wheatley v. Patrick*, 2 M. & W. 650 (Ex. 1837) (another often cited case which speaks of the custodian's "consent" and "management" without paying attention to the chance to restrain the negligent act); *Samson v. Aitchison* [1912] A.C. 844 (P.C.) (owner liable on control theory even where no evidence that accident happened "through any actual personal negligence"); *Cain v. Bowlby*, 114 F.2d 519 (10th Cir. 1940) (servant custodian asleep in truck driven by substitute); *Keen v. Clarkson*, 56 Ariz. 437, 108 P.2d 573 (1940) (substitute driving in presence of employee "is considered as the alter ego of the employee"); *Thixton v. Palmer*, 210 Ky. 838, 276 S.W. 971 (1925) (facts stated suggest there may have been negligent failure to control, but opinion makes

abandoned as a test, however, any distinction between cases where he is present and where he is absent seems arbitrary and capricious.

"Scope of employment" is not confined to acts which may be thought of as component parts of the assigned work (as the illustrations given above may be), but also includes acts which may "fairly and reasonably [be] regarded as incidental to the work specifically directed or which [are] usually done in connection with such work."⁷¹ Thus when Sears Roebuck hired a man to lay linoleum which had been sold to plaintiff's wife, the disconnecting of a gas stove in order to lay the linoleum under it (although the kind of thing usually done by a plumber, gas-fitter, etc.) was incidental to the job, and the seller was liable for damage caused by fire resulting from the negligent way in which the gas was disconnected.⁷²

Acts which do not further the assigned task

Further complications are injected into the problem where the servant for his own purposes deviates from what he is employed to do (and from what is incidental to furthering his master's pur-

nothing of this); *Beaudoin v. Mahaney*, 131 Me. 118, 159 Atl. 567 (1932); *Powers v. State*, 178 Md. 23, 11 A.2d 909 (1940) (owner drunk and asleep on back seat, liable on "control" theory); *Parks v. Pere Marquette R. Co.*, 315 Mich. 38, 23 N.W.2d 196 (1946); *Kayser v. Van Nest*, 125 Minn. 277, 146 N.W. 1091 (1914). Compare A.L.R. notes, cited note 62 *supra*, which in a heading refer to the "theory of constructive identity." See James, *Scope of Duty in Negligence Cases*, 47 Northwestern U.L. Rev. 778, 811 n. 178 (1953). The practical upshot of these cases is a rule of thumb holding the owner or custodian liable for negligent operation of the vehicle while he is present in the vehicle, whether or not he had an actual chance to prevent that negligence.

The implication of such a rule for the present problem is clear. If the custodian is liable (and if the vehicle is being driven in the master's service) then his master is vicariously liable. *Booth v. Mister*, *Cain v. Bowlby*, *Keen v. Clarkson*, *Thixton v. Palmer*, *Beaudoin v. Mahaney*, all *supra*.

Caution prompts a reminder that not all courts follow the rule of thumb described in this note. The cases cited in note 25 *supra*, and the first three cases cited in note 64 insist on a genuine showing of negligence (on the part of the owner or custodian) in failing to control the operator's conduct. But even where there is such an insistence, his presence in the vehicle may afford a rebuttable presumption of such negligence. *Wheeler v. Darmochwat*, 280 Mass. 553, 183 N.E. 55 (1932); *Bell v. Jacobs*, 261 Pa. 204, 104 Atl. 587 (1918).

The web of fiction and confusion spun by many of the cases cited in this note stands in marked contrast to the Alabama Court's forthright refusal to attach any significance to the presence or absence of the servant in determining the master's vicarious liability. *Emison v. Wylam Ice Cream Co.*, note 68 *supra* ("In each case the servant uses the instrumentality for the purpose intended and authorized, and in each case the directed act of his assistant is equally the act of his servant . . ."); cf. *Indianapolis v. Lee*, 78 Ind. App. 506, 132 N.E. 605 (1921).

As to the question whether the extension of vicarious liability made in the *Emison* case and urged in the text would necessarily have unfortunate repercussions in also extending the scope of imputed contributory negligence, compare James, *Imputed Contributory Negligence*, 14 La. L. Rev. 340 (1954); James, *Scope of Duty in Negligence Cases*, *supra*, at 811, 812, notes 175 *et seq.*

⁷¹Restatement, Agency § 229, comment a.

⁷²*Sears Roebuck & Co. v. Creekmore*, 199 Miss. 48, 23 So.2d 250 (1945); cf. *Peay v. Reidy*, 321 Mass. 455, 73 N.E.2d 737 (1947).

pose).⁷³ Here courts have drawn a line between detour and frolic — between deviations that are treated as still within the scope of employment and those that are regarded as a complete abandonment of it.⁷⁴

The simplest case of detour is that of a driver who is employed to drive a truck to deliver his master's goods to a point 10 miles south of the store, but who drives the loaded truck a short block west of the prescribed direct route to get some cigarettes, intending to return forthwith to the performance of his duty. If he negligently injures plaintiff, during the deviation, the master is generally held liable.⁷⁵

At the other extreme stands the case where the driver, having delivered the goods, proceeds to take a 50 mile drive further south

⁷³The cases dealt with here generally involve an unauthorized, un-consented-to deviation by the servant. But the master's consent to the use of his instrumentalities (*e.g.*, truck) for the servant's own purposes, such as a fishing trip, does not bring that use within the scope of employment. *White v. Sims*, 211 Ark. 499, 201 S.W.2d 21 (1947); A.L.R. notes cited in note 75 *infra*. In fact the limits of that scope do not seem to be very much affected by the matter of consent. See *Smith, Frolic & Detour*, 23 Col. L. Rev. 716, 720 (1923). There may, however, be reasons in policy for imposing liability, for all acts done within the scope of *consent* (rather than of employment) to use some dangerous instrumentalities. And there has been increasing legislative recognition of the need for such broader liability in the case of automobiles. See series of A.L.R. notes of which last is in 135 A.L.R. 481 (1941). Under such statutes, of course, the master will be held occasionally when his vehicle is used by the servant with consent, just as any bailor will be held, without regard to its relationship to the employment. On the other hand vicarious liability *respondet superior* will still be imposed under the principles dealt with in the text, when there is no consent.

Compare the master's occasional liability for the sportive misuse of inherently dangerous instrumentalities like torpedoes and firearms. See pages 191 *et seq. infra*.

⁷⁴The currency of the terms "frolic" and "detour" in this connection is generally attributed to the language of Baron Parke in summing up to the jury in *Joel v. Morrison*, 6 Carr. & P. 501, 503 (N.P. 1834) ("The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.")

In general see *Y. B. Smith, Frolic and Detour*, 23 Col. L. Rev. 444, 716 (1923); *Douglas, Vicarious Liability and Administration of Risk*, 38 Yale L.J. 584 (1929); *Restatement, Agency* §§ 228-237.

⁷⁵A leading American case is *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 30 (1893) wherein the court said: "... in by far the greater number of cases where the question of the master's responsibility turns ... principally upon the mere extent of the deviation by the servant from the strict course of his employment or duty, it has been generally held to be one of fact and not of law ... depending upon the degree of deviation and all the attendant circumstances. ... Where the deviation is slight and not unusual, the court may ... as matter of law, determine that the servant was still executing his master's business. ... Where the deviation is very marked and unusual, the court may ... determine that the servant was not on his master's business at all, but his own." Plaintiff's judgment was sustained.

See also note 74 *supra*, and cases cited in notes, 22 A.L.R. 1397 (1923); 45 A.L.R. 477 (1926); 68 A.L.R. 1051 (1930); 80 A.L.R. 725 (1932); 122 A.L.R. 858 (1939).

to see his girl and on his way there injures plaintiff 25 miles south of where he delivered the goods. Here the master is not held.⁷⁶

Between these extremes exist the greatest confusion and contrariety of opinion. Most courts and commentators agree that no clear line can be drawn although some of the earlier cases are marked by a striving for precise — and arbitrary — tests.⁷⁷ For the most part the tendency has been to recognize the importance of a number of factors, attaching to each a weight that varies with the circumstances⁷⁸ — a process that is usually committed to the jury. These factors include the time and place of the deviation, its extent with relation to the prescribed route, whether its motivation is in part to serve the master, and whether it is a usual sort of deviation for servants on such a job.⁷⁹ On the whole, this approach seems commendable. The very nature of the line sought to be drawn calls for flexibility. But in setting the limits to the jury's part in this weighing process, the courts need to keep constantly in mind, as an integrating principle, the basis for vicarious liability — namely, that the employer should be liable for those faults which may fairly be regarded as risks of his business, whether they are committed in furthering it or not.⁸⁰ In the light of this, some rules which have gained currency here seem to overemphasize individual items among these factors at the expense of underlying principle. Thus there are holdings that, if a deviation involves a distinct departure from the prescribed route (*e.g.*, going in the opposite direction) and is made to serve only the servant's personal interests it is a temporary abandonment of the master's service even though it is a relatively insignificant and not unusual interruption of it.⁸¹ Un-

⁷⁶This is adapted from the illustration given by Douglas of a case wherein frolic would be found under any test, Douglas, note 42 *supra*, at 587. The master's liability is typically denied in cases much less extreme. See, *e.g.*, *McCauley v. Steward*, 63 Ariz. 524, 164 P.2d 465 (1945); *Campbell v. Warner*, 234 N.Y. 645, 138 N.E. 481 (1923); Restatement, Agency §§ 229(2)(b), 234.

⁷⁷An excellent collection of these cases may be found in 6 Labatt, Master & Servant § 2295 n. 1 (2d ed. 1913). See also survey of Ohio cases in note 21 U. of Cin. L. Rev. 156 (1952). Typical of such holdings is *McCarty v. Timmins*, 178 Mass. 378, 59 N.E. 1038 (1901), discussed in Smith, Frolic & Detour, 23 Col. L. Rev. at 723. See also discussions in majority and dissenting opinions in *Kohlman v. Hyland*, 54 N.D. 710, 210 N.W. 643 (1926).

⁷⁸*McConville v. United States*, 197 F.2d 680 (2d Cir. 1952); *Edwards v. Earnest*, 206 Ala. 1, 89 So. 729 (1921); *Healey v. Corkrill*, 133 Ark. 327, 202 S.W. 229 (1918); *Ritchie v. Waller*, note 75 *supra*; *Osipoff v. City of New York*, 286 N.Y. 422, 36 N.E.2d 646 (1941); *Kohlman v. Hyland*, 54 N.D. 710, 210 N.W. 643 (1926); *Leuthold v. Goodman*, 22 Wash.2d 583, 157 P.2d 326 (1945); cases cited in A.L.R. notes, note 75 *supra*.

Some states, while stating the rule that doubtful questions are for the jury, seem to tend towards restricting the jury's sphere in practice. See, *e.g.*, the review of Missouri cases in *Klotsch v. P. F. Collier & Son Corp.*, 159 S.W.2d 589 (Mo. 1942).

⁷⁹Restatement, Agency §§ 229-237.

⁸⁰See notes 56-59 *supra*, and accompanying text.

⁸¹*Lucas v. Friedman*, 24 F.2d 271 (D.C. Cir. 1928); *Patterson v. Kates*, 152 Fed. 481 (C.C. Pa. 1907); *McCauley v. Steward*, 63 Ariz. 524, 164 P.2d 465 (1945); *McCarty v. Timmins*, 178 Mass. 378, 59 N.E. 1038 (1901); *Stone v.*

fortunately the Restatement language that the servant's conduct must be "actuated, at least in part by a purpose to serve the master"⁸² tends to invite such rulings,⁸³ though another section,⁸⁴ the illustrations given,⁸⁵ and the Reporter's notes⁸⁶ suggest that the language was not meant to cover such a case. Fortunately such mechanical tests do not enjoy the favor of most courts today. Thus in a recent Ohio case the servant was directed to drive a car from a parking lot to a garage 160 feet due west of the lot. He drove it east from the lot to take a circuitous route "in order to derive more pleasure from the task in hand" and had gone some 600 feet when the accident happened. It was held a jury question whether this deviation was "so divergent 'from his regular duties that its very character severs the relationship of master and servant.'"⁸⁷ In a South Carolina case an oil truck driver, who had been drinking, partly delivered a consignment of gasoline at Rock Hill, S. C., some 25 miles from his master's place of business in Charlotte, N. C., abruptly interrupted the delivery to drive to see a girl in York (through which he intended to get back, circuitously, to Charlotte). The master was held for an accident at York, some 15 miles from the direct route.⁸⁸ These cases exemplify a point made by Dean Smith in a leading article some thirty years ago that the servant's motive is significant only to the extent that it sheds light on whether his conduct may fairly be regarded as a risk of his master's business.⁸⁹ A motive to abandon that, or to use it as an occasion to gratify personal spite standing alone may perhaps take conduct

Reed, 247 S.W.2d 325 (Mo. App. 1952); *Lemarier v. A. Towle & Co.*, 94 N.H. 246, 51 A.2d 42 (1947); Ohio cases collected in note, 21 U. of Cin. L. Rev. 156 (1952); cf. *Summerville v. Gillespie*, 181 Ore. 144, 179 P.2d 719 (1947) (in which there was the added factor that the servant's employment had not technically begun when the deviation occurred).

⁸²Restatement, Agency § 228(c) (1933); cf. *id.* § 235.

⁸³See the cases in note 81 *supra* decided since the Restatement, particularly *Lemarier v. Towle*.

⁸⁴Restatement, Agency § 234.

⁸⁵None of those given under any of the sections here dealt with seems to deal precisely with this most common type of case. Those under § 234, however (providing flexible limits of space) seem closer to it than those under § 235 which deal with situations where the servant takes an occasion on the job to gratify a personal malice in no way engendered by the employment.

⁸⁶See Seavey, *Studies in Agency* 228-230 (1949) (expressly disapproving the Lucas, Patterson, and McCarty cases).

⁸⁷*Edwards v. Benedict*, 79 Oh. App. 134, 70 N.E.2d 471 (1946). But cf. Note, 21 U. of Cin. L. Rev. 156 (1952).

⁸⁸*Carroll v. Beard-Laney, Inc.*, 207 S.C. 339, 35 S.E.2d 425 (1945).

⁸⁹"The servant's motive may be of great importance in determining whether it was probable that he would do what he did. But the master's liability should be predicated upon the probability of the act rather than upon the character of the motives which prompted it." Smith, Frolic and Detour, 23 Col. L. Rev. 716, 726-7 (1923). A good deal of the analysis in the text parallels that in this article. It is suggested that Smith uses the terms "probability" and "foreseeability" in the broad sense referred to above rather than in the sense that is relevant for finding negligence.

out of that category as most people would view things today.⁹⁰ The motive to deviate should not⁹¹ have such an effect even if the master is in no way served by the deviation as distinguished from the service it interrupts.

When a servant has temporarily abandoned his master's service, there will be some point at which he will be treated as reentering it. For this most courts require an intent to re-enter it (which may of course be evidenced circumstantially), and in addition some concrete conduct which brings him again "within the flexible limits of his employment" as to time and space.⁹²

⁹⁰Restatement, Agency § 235, particularly illustrations 2 and 3.

The same notion applies in workmen's compensation cases. See, e.g., *Gaurin v. Bagley & Sewall Co.*, 298 N.Y. 511, 80 N.E.2d 660 (1948).

In connection with the present problem, workmen's compensation precedents should be analyzed with care, and the following distinctions kept in mind:

(1) Many compensation cases hold that quarrels, assaults or horseplay among employees "may reasonably be regarded as an incident of the employment," even though they are in no way intended to further the employer's business, if they are engendered by the associations or conditions of employment, or if they have become customary, or if they are the kind reasonably to be expected. See 1 *Larson, Workmen's Compensation Law*, §§ 11, 23 (1952); sources cited note 59 *supra*. Such decisions seem analogous and applicable to the present problem. If an outsider is hurt by such conduct, he should have the benefit of *respondeat superior*.

(2) Some decisions withhold compensation from a workman who has himself instigated or willingly participated in horseplay. To the extent that such decisions proceed from a policy of barring an "aggressor" from compensation, they should have no relevance to the suit of an outside party who is the innocent victim of the conduct. Examples of such decisions are *Wittmer v. Dexter Mfg. Co.*, 204 Iowa 180, 214 N.W. 700 (1927); *Frost v. H. H. Franklin Mfg. Co.*, 204 App. Div. 700, 198 N.Y. Supp. 521 (1923); *aff'd* 236 N.Y. 649, 142 N.E. 319 (1923); see discussions of them in 2 *Larson, supra* at 357, 359, 360; *cf. id.* at § 11.15 (the aggressor defense in assault cases). Where a workman is denied compensation, however, because his own conduct ceases to be an incident of his employment, as in *Guarin v. Bagley & Sewall Co.*, *supra*, the decision would be logically relevant to the question whether the employer is vicariously liable to the innocent outside victim of such conduct.

(3) A case awarding compensation to an employee-victim of horseplay or assault will not necessarily govern the employer's vicarious liability to an outside victim of that conduct. Compensation may be payable to the employee victim if the injury is an incident to *his* employment even where the injury is caused by an outsider for whose conduct the employer is in no way responsible. See, e.g., *Larson, supra* § 11.11(c). Similarly the employee-victim's injury may be compensable because of its relationship to the victim's employment, even though the fellow employee who caused it stepped outside the scope of *his* (the instigator's) employment to play the joke that caused the harm. See for example *Knopp v. American Car. & F. Co.*, 186 Ill. App. 605 (1914); *Phil Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 204 S.W. 152 (1918); *Larson, supra* at § 23.10. In strict logic those cases should be of no help to the outside victim of such conduct. Clearly there will be no *vicarious* liability for harm done *by* an outsider *to* an outsider (though there may be liability on some other basis). But where the outsider is hurt by an employee, any comfort which the present analysis might afford to employers must be tempered by the present judicial tendency to regard horseplay, *by employees on the job* as one of the incidents of the job. See, e.g., *Burns v. Merritt Eng. Co.*, 302 N.Y. 131, 96 N.E.2d 739 (1951), noted 1 *Buffalo L. Rev.* 74 (1951); sources cited in note 59 *supra*.

⁹¹The deviation may, of course, be so great or so unusual that it involves a temporary abandonment of the employment. The distinction is one of degree. *Leuthold v. Goodman*, 22 Wash.2d 583, 157 P.2d 326 (1945).

⁹²The leading case is *Riley v. Standard Oil Co.*, 231 N.Y. 301, 132 N.E. 97

There are also acts which do not involve deviation from the assigned task — which are done on the job but which in no way tend to further it. Typical of these is smoking, with its attendant fire hazards. Presumably all courts would hold the master if he permitted smoking or failed to take reasonable steps to prevent it on jobs where it was unreasonably dangerous.⁹³ Some courts seem unwilling to go beyond this;⁹⁴ they regard smoking as outside the scope of employment. But there is a line of cases which — while recognizing the same premise — hold that if smoking makes negligent the manner of performing some act which is within the scope of employment (*e.g.*, being a custodian of combustible property), the master is liable for that negligence.⁹⁵ Even this seems too narrow and would lead to capricious results. Thus in *Kelly v. Louisiana Oil Refining Co.*⁹⁶ the driver of a gasoline truck, having delivered gasoline to a cotton broker, went into the broker's place of business to telephone his employer's office, lit a cigarette and tossed the match into loose lint cotton. The master was not held though the court suggested it might have been otherwise if the driver had tossed the match into the gasoline he was delivering. And smoking in a woodshop has been held not to result in a negligent job of carpentry though it causes a fire.⁹⁷

A broader view is suggested by a recent California case⁹⁸ which

(1921). See also *McConville v. United States*, 197 F.2d 680 (2d Cir. 1952); *Central Truckway System v. Moore*, 304 Ky. 533, 201 S.W.2d 725 (1947); *Kohlman v. Hyland*, 54 N.D. 710, 210 N.W. 643 (1926); Restatement, Agency § 237.

Narrower holdings are *Brown v. Moore*, 248 S.W.2d 553 (Mo. 1952); *Summerville v. Gillespie*, 181 Ore. 144, 179 P.2d 719 (1947); *Kirker v. W. M. McIntosh Co.*, 156 Pa. Super. 199, 39 A.2d 846 (1945); *cf. James v. Williams*, 177 La. 1033, 150 So. 9 (1933); *Murphy v. Kuhartz*, 244 Mich. 54, 221 N.W. 143 (1928); Note, 6 Mo. L. Rev. 331 (1941) (criticizing "mechanical" approach).

⁹³*Palmer v. Keene Forestry Ass'n*, 80 N.H. 68, 112 Atl. 798 (1921); *Bluestein v. Scoparino*, 277 App. Div. 534, 100 N.Y.S.2d 577 (1950); *Keyser Canning Co. v. Klots Throwing Co.*, 94 W. Va. 346, 118 S.E. 521 (1923).

⁹⁴*Feeney v. Standard Oil Co.*, 58 Cal. App. 587, 209 P. 85 (1922) (liability was imposed, however, for the servant's negligence in failing to remove spilled gasoline from place where people likely to smoke); *Tomlinson v. Sharpe*, 226 N.C. 177, 37 S.E.2d 498 (1946); *Herr v. Simplex Paper Box Co.*, 330 Pa. 129, 198 Atl. 309 (1938).

⁹⁵*Jefferson v. Derbyshire Farmers, Ltd.* [1921] 2 K.B. 281; *Wood v. Sanders*, 228 App. Div. 69, 238 N.Y. Supp. 571 (1930); Restatement, Agency § 235, comment *d*; *cf. George v. Bekins Van & S. Co.*, 33 Cal.2d 834, 205 P.2d 1037 (1949), noted in 4 Ark. L. Rev. 217 (1950); (both of which describe and analyze the currently prevailing rules).

One ground of decision in the *George* case was that "[a] bailee's employees while on the job are acting as custodians of the bailments, and any conduct on their part that creates an unreasonable risk of damage to the bailments renders them negligent as custodians."

⁹⁶167 Tenn. 101, 66 S.W.2d 997 (1934).

⁹⁷*Williams v. Jones*, 3 Hurl. & C. 602 (Ex. 1865).

⁹⁸*George v. Bekins Van & S. Co.*, 33 Cal.2d 834, 205 P.2d 1037 (1949), noted in 4 Ark. L. Rev. 219 (1950); *cf. Vincennes Steel Corp. v. Gibson*, 194 Ark. 58, 106 S.W.2d 173 (1937). The *George* case was alternatively decided on narrower grounds that came within the Restatement rule. See note 95 *supra*.

looks to see whether the injury is "one of the risks of the enterprise." Since the presence of employees on the job "was attended by the risk that smoking on [their] part would set fire to" property which was exposed to this danger, "[t]his risk is one arising out of the employment."⁹⁹ This result is the one most in keeping with the principles underlying vicarious liability.

Another situation that has given the courts a good deal of trouble is the case of injury to the servant's unauthorized invitee. Typically defendant's driver, against orders, allows plaintiff to ride in defendant's truck, and proceeds to drive on his master's business, in the course of which the driver negligently causes an accident in which plaintiff is injured. The courts have taken divergent views of this problem. About half the decisions treat the invitee (once he is upon the truck) as a seen trespasser and hold defendant for any later conduct of the driver in the course of his employment which would constitute a breach of duty to such a trespasser.¹⁰⁰ In some of these states ordinary negligence is such a breach;¹⁰¹ others require wanton or wilful misconduct.¹⁰²

About an equal number of decisions¹⁰³ (and the Restatement)¹⁰⁴ deny any application of *respondeat superior* at the suit of the unauthorized invitee (though the same negligence of the servant would be imputed to the master in a suit for injuries to an outsider).¹⁰⁵ The reasons given in judicial opinions for the restrictive rule are far from satisfactory.¹⁰⁶ Seavey suggests that the Ameri-

⁹⁹Of course the smoking at all, or the manner of it on the employee's part must be negligent to create liability in anyone.

¹⁰⁰A collection of the cases may be found in Seavey, *Studies in Agency* 240-249 (1949); annotations, 14 A.L.R. 145 (1921); 62 A.L.R. 1167 (1929); 74 A.L.R. 163 (1931). Typical cases are *Kalmich v. White*, 95 Conn. 568, 111 Atl. 845 (1920); *Kuharski v. Somers Motor Lines, Inc.*, 132 Conn. 269, 43 A.2d 777 (1945); *Slother v. Jaffe*, 356 Pa. 238, 51 A.2d 747 (1947).

¹⁰¹As in the *Kalmich* and *Kuharski* cases, note 100 *supra*.

¹⁰²As in *Slother v. Jaffe*, note 100 *supra*; *Lipscomb v. News Star W. P. Co.*, 5 So.2d 41 (La. App. 1941).

¹⁰³See collections of cases referred to in note 100 *supra*. Typical decisions are *Thomas v. Magnolia Petroleum Co.*, 177 Ark. 963, 9 S.W.2d 1 (1928); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935); *Dearborn v. Fuller*, 79 N.H. 217, 107 Atl. 607 (1919); *Union Gas & E. Co. v. Crouch*, 123 Ohio 81, 174 N.E. 6 (1930) (overruling former more liberal case). Compare *Psota v. Long Island R. Co.*, 246 N.Y. 388, 159 N.E. 180 (1927).

¹⁰⁴Restatement, Agency § 242. This was done over the recommendation of the "Reporter and a majority of his Advisers." Seavey, note 100 *supra*, at 242.

¹⁰⁵*Campbell Baking Co. v. Clark*, 175 Ark. 889, 1 S.W.2d 35 (1927). See also the treatment of that case in *Thomas v. Magnolia Petroleum Co.*, note 103 *supra*.

¹⁰⁶Seavey, note 100 *supra*, at 242 sums up these reasons as (1) the notion that the unauthorized invitation rather than the subsequent negligent driving is the proximate cause of the injury; (2) the argument that the servant's knowledge of the trespasser's presence is not to be imputed to the master, because that knowledge came from unauthorized conduct. But surely, as Seavey says, the negligence that produced the accident is a proximate cause of plaintiff's injury (though the invitation may be too), and "if the servant [in his later driving] is acting within the scope of his employment all that he knows, however and whenever acquired, is relevant."

can Law Institute was influenced by "the belief that the invitee, unlike the trespasser, had so far identified himself with the servant's disobedience that it is unfair to subject the master to liability for the servant's act."¹⁰⁷

So far as general application of *respondeat superior* goes, both lines of cases seem too narrow. The taking on of a rider, though forbidden, seems to be no less an incident of the business than a trivial forbidden detour. Surely the conduct in continuing to drive with the passenger on board is not taken out of the scope of employment by the passenger's presence. It has been suggested that picking up the guest is beyond that scope.¹⁰⁸ But again, if the act of stopping to pick up the guest negligently injured a third person, the master should surely respond to the latter. The driver's conduct is not, therefore, beyond the scope of his employment in any generally applicable sense, and recovery should not be denied by declaring that it is. If there is a valid policy against allowing recovery to a participant in the risk, that policy should be implemented through legal rules better adapted as a vehicle for it, such as the rule of a guest statute, the doctrine of assumed risk, or a rule frankly cutting down a trespasser's recovery in such cases.¹⁰⁹ Or if the rider is to be denied the benefit of vicarious liability in such an instance, courts should distinctly recognize that his disability to invoke the doctrine rests on a ground personal to him — his participation in the driver's disobedience — which does not affect the objective test of the scope of the servant's employment.¹¹⁰

Wilful wrongs, trespasses, etc.

There was once a great deal of conceptual and procedural difficulty in the way of holding the master for the deliberate and other wilful wrongs of his servant in any case where such acts were not specifically commanded.¹¹¹ When the implied command notion dominated the scene, it seemed anomalous to imply an authority to

¹⁰⁷*Id.* at 241.

¹⁰⁸*Id.* at 243.

¹⁰⁹But contrast Eldredge, *Tort Liability to Trespassers*, 12 Temple L.Q. 32, 46 (1937) reprinted in *Modern Tort Problems* 163, 185 (1937) (wherein the author says the problem is essentially one of vicarious liability).

¹¹⁰Many defenses are held to impose a bar no wider than the policy behind them requires. See, *e.g.*, *Welch v. Davis*, 410 Ill. 130, 101 N.E.2d 547 (1951); *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); Note, 46 Col. L. Rev. 148 (1946).

¹¹¹See *McManus v. Crickett*, 1 East 105 (K.B. 1800) (trespass would not lie against master for wilful act of servant); *Wright v. Wilcox*, 19 Wend. 343 (N.Y. 1838) (case would not lie against master and servant jointly for latter's wilful act); Laski, *Basis of Vicarious Liability*, 26 Yale L.J. 105, 118 (1916); Seavey, *Studies in Agency* 249 *et seq.* (1949); *cf.* *Croft v. Alison*, 4 B. & Ald. 590 (K.B. 1821), which has a slightly more modern flavor.

commit wrong.¹¹² Particularly was this true where the master was a corporation which, having no soul or mind, was quite incapable of malice. But all this is now a matter of history.¹¹³ There is now no doubt of the master's liability for deliberate or wilful wrongs done in the scope of his (or its) employment.¹¹⁴

Much that has been said heretofore is fully applicable here. But there are some problems which deserve special treatment. The master will of course be held where he has commanded the wrong itself, or has been negligent in selecting the servant or in failing to control his conduct, but these are not cases of vicarious liability.¹¹⁵

Vicarious liability is generally imposed where the wrong is done wholly or partly to further the master's business. Thus where a bus driver crowds a competitor's bus into a ditch,¹¹⁶ a watchman assaults a trespasser to eject him from the master's premises,¹¹⁷ or a salesman makes fraudulent statements about his master's prod-

¹¹²See *Wright v. Wilcox*, note 111 *supra*, at 345, 346 ("To subject the master in such a case [a wilful act of servant], it must be proved that he actually assented, for the law will not imply assent."); *Seavey*, note 111 *supra*, at 250.

¹¹³So far as the vicarious liability of corporations goes, the modern view is well set out in the following passage quoted by the court from *Harper*, *Law of Torts* § 293 (1933) in *Osipoff v. City of New York*, 286 N.Y. 422, 36 N.E.2d 646, 648 (1941):

"There was a tendency, at one time, to ignore the realities of what corporations actually do and, in working out the law of corporate liability to predicate results upon what it 'could' and 'could not' do, as a logical incident of its metaphysical reality. Although faced with the fact that corporations were actually committing torts and crimes in the same way and by the same agencies employed in making contracts, courts could not escape the argument that a creature with no mind or soul could not commit wrongs requiring a specific intent or a definite guilty mind.

"But the argument based upon the 'nature' of the corporation, 'more quaint, than substantial,' has been universally repudiated. Corporations commit torts by the same people who effect and consummate their legitimate activities. For the most part, a corporation is liable, as an individual, for tort committed by its servants or agents acting within the scope of their service or agency quite as it is liable on its contracts properly executed and entered into by its agents. Thus, corporations have been held liable for assault and battery, false imprisonment, slander and libel, wrongful death, conversion, negligence, deceit, and various types of harm resulting from its extra-hazardous activities, including nuisance, blasting, and keeping dangerous animals, under the same circumstances that would entail liability on the part of an individual principal. And it may be liable for malicious prosecution and other types of tort requiring malice or an evil intent."

¹¹⁴*Limpus v. London General Omnibus Co.*, 1 H. & C. 526 (Ex. 1862); *Savannah Electric Co. v. Wheeler*, 128 Ga. 550, 58 S.E. 38 (1907); *Osipoff v. City of New York*, note 113 *supra*; *Laski*, *loc. cit. supra* note 111; *Mechem*, *Agency* §§ 1958-9 (2d ed. 1914); *Seavey*, *op. cit. supra* note 111; *Restatement*, *Agency* § 245.

§§ 1958-9 (2d ed. 1914); *Seavey*, note 111 *supra*; *Restatement*, *Agency* § 245.

¹¹⁵See text at notes 3-7 *supra*.

¹¹⁶*Limpus v. London General Omnibus Co.*, note 114 *supra*; *Seavey*, *op. cit. supra* note 111, at 255.

¹¹⁷*Goodyear T. & R. Co. v. Paddock*, 219 Ind. 672, 40 N.E.2d 697 (1942) (ejection from office by manager); *Dierkes v. Hauxhurst Land Co.*, 80 N.J.L. 369, 79 Atl. 361 (1911) (caretaker set dogs on children); *Seavey*, note 111 *supra*, at 253.

uct¹¹⁸ or false, disparaging statements about a rival's,¹¹⁹ the wrong in each case is imputed to the innocent master. But limitations have sometimes been put on the master's liability even here where "the servant was not engaged in an employment calling for the use of force against others and . . . there was no antecedent likelihood that an assault would be committed. . . ."¹²⁰ Under this view liability will be imposed where the servant is, for example, charged with the protection of his master's land or chattel, or with the recaption of a chattel, and illegal force is used in fulfilling this duty. But some courts have withheld liability where the servant was employed merely to collect a bill.¹²¹ Another limitation suggested by some cases is that the master will not be held for the use of unpredictable and outrageous methods such as shooting a debtor.¹²² These limitations come from a narrow concept of what is foreseeable, which would be appropriate enough on an issue of the master's negligence but are out of place in determining the scope of his servant's employment.

Where the deliberate or wilful wrong was not done to further the master's business the tendency has been to deny vicarious liability, but here too there have been qualifications. The relationship between the master and plaintiff may be such as to put on the master a duty of protective care that he may not delegate. Thus a carrier is liable to its passengers for assaults by employees

¹¹⁸*Moynes v. Applebaum*, 218 Mich. 198, 187 N.W. 241 (1922); *Seavey, op. cit. supra* note 111, at 261 *et seq.*; Restatement, Agency §§ 249, 258; *cf. Ferson, Liability of Employers for Misrepresentations Made by Independent Contractors*, 3 Vand. L. Rev. 1 (1949).

¹¹⁹*Rosenberg v. J. C. Penney Co.*, 30 Cal. App.2d 609, 623, 86 P.2d 696, 704 (1939); *cf. Restatement, Agency* §§ 247, 248.

¹²⁰*Seavey, op. cit. supra* note 111, at 254; *cf. Restatement, Agency* § 245 (especially comment *d*).

¹²¹*Moskins Stores, Inc. v. De Hart*, 217 Ind. 622, 29 N.E.2d 948 (1940) (with which compare *Goodyear T. & R. Co. v. Paddock*, note 117 *supra*); Restatement, Agency § 245, comment *d*; 35 Am. Jur. Master & Servant § 575 (1941); *cf. notes* 10 A.L.R. 1087 (1921), 75 A.L.R. 1176 (1931).

Upon this point there is a conflict among the cases. Liability has been imposed on the master for assaults by the servant in the course of his attempt to collect a bill. See, *e.g.*, *New Morgan County Building & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923). The conflict is noted and cases collected in *Seavey, op. cit. supra* note 111, at 261.

Compare *Osipoff v. City of New York*, note 113 *supra*; *Hodson v. Great A. & P. Tea Co.*, 66 F. Supp. 514 (W.D. Mo. 1946), noted in 25 Tex. L. Rev. 543 (1947); and cases cited notes 126-130 *infra*.

¹²²*E.g.*, *Craig's Adm'x v. Kentucky Utilities Co.*, 183 Ky. 274, 209 S.W. 33 (1919); Restatement, Agency § 245, comment *d*, illustration 9.

Some courts are quite unwilling to impose such a limitation. See, *e.g.*, *Jackson v. American Tel. & Tel. Co.*, 139 N.C. 347, 51 S.E. 1015 (1905) (defendant's foreman filed groundless charge against objecting landowner so as to put poles on land while landowner was in jail); *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (1922) (railroad gate tender shot at automobile whose driver had requested gates to be raised, killing occupant); *Mechem*, Agency § 1960 (2d ed. 1914), which would support liability if the act sprang from "some impulse or emotion which naturally grew out of . . . the attempt to perform the master's business; . . ." Compare notes 126-130 *infra*, which present a problem into which the present one merges.

prompted by purely personal motives.¹²³ And similar rulings may be expected as to innkeepers, proprietors of public utilities and the like.¹²⁴ In the absence of such a relationship the master is not held where the servant's wrong comes from personal spite or malice not engendered by anything connected with the employment.¹²⁵

Perhaps the most troublesome case is that where the master's affairs are not being furthered but the servant hurts plaintiff in a quarrel that does arise out of the employment. A truck driver and plaintiff collide, for example, and in the altercation so likely to follow such an incident the driver loses his temper and strikes plaintiff.¹²⁶ Or a restaurant counterman is angered by insults over the matter of a sandwich, and hits a customer.¹²⁷ The majority of courts do not allow recovery in these cases¹²⁸ except where it can be rested on some narrower ground such as the non-delegable duty, or negligence in employing a man known to be hot tempered. Some decisions point to a broader liability, however,¹²⁹ and recent opinions of the California Supreme Court have set forth compelling

¹²³Rather dramatic examples are furnished by *Coop Cab Co. v. Singleton*, 66 Ga. App. 874, 19 S.E.2d 541 (1942) (taxi driver raped passenger); *Jenkins v. General Cab Co. of Nashville*, 175 Tenn. 409, 135 S.W.2d 448 (1940) (passenger by misfortune took cab that turned out to be driven by her estranged husband. Mutual discovery of the situation led to continuation of the family quarrel and assault, etc., upon the wife-passenger). *Cf. Betz v. Teche Lines, Inc.*, 7 So.2d 656 (La. App. 1942).

¹²⁴See, e.g., *Stone v. William E. Eisen Co.*, 219 N.Y. 205, 114 N.E. 44 (1916) (indecent assault by employee of surgical appliance company); *Munick v. City of Durham*, 181 N.C. 188, 106 S.E. 665 (1921) (assault by water company employee); *cf. Davidson v. Chinese Republic Restaurant*, 201 Mich. 389, 167 N.W. 967 (1918) (distinguishing restaurant from hotel). See *Mechem, Agency* §§ 1939-1944 (2d ed. 1914).

¹²⁵This is conceded on all hands. See, e.g., *Restatement, Agency* § 235; *Mechem, Agency* § 1928 (2d ed. 1914); *Seavey, op. cit. supra* note 111, at 256-8, collecting cases many of which involve altercations engendered by the employment.

¹²⁶See, e.g., *Fields v. Sanders*, 29 Cal.2d 834, 180 P.2d 684 (1947), noted 28 Ore. L. Rev. 83 (1948) (master held); *Johnson v. M. J. Uline Co.*, 40 A.2d 260 (Minn. App. D.C. 1949) (master not held); *Georgia Power Co. v. Shipp*, 1952 Ga. 446, 24 S.E.2d 764 (1943) (master not held); *Valley v. Clay*, 151 La. 710, 92 So. 308 (1922) (master not held); *Plotkin v. Northland Tr. Co.*, 204 Minn. 422, 283 N.W. 758 (1939) (master not held); *State ex rel. Gosselin v. Trimble*, 328 Mo. 760, 41 S.W.2d 801 (1931) (master not held); *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 49 S.E.2d 363 (1948) (master held). Not all these cases involved an actual collision.

¹²⁷*Dilli v. Johnson*, 107 F.2d 669 (D.C. Cir. 1939) (master held).

¹²⁸*Turner v. American Dist. Tel. & M. Co.*, 94 Conn. 707, 110 Atl. 540 (1920); cases cited n. 126 *supra*; cases cited *Seavey, op. cit. supra* note 111, at 255-8; *Restatement, Agency* § 245. Some of these cases involve punishment of a trespasser by defendant's custodian after completion of the trespass (as distinguished from use of force to repel the trespass). See, e.g., *Georgia Ry. & Banking Co. v. Wood*, 94 Ga. 124, 21 S.E. 288 (1894); *State ex rel. Gosselin v. Trimble*, note 126 *supra*.

¹²⁹In addition to the *Fields* and the *Tri-State* cases, note 126 *supra*, and the *Dilli* case, note 127 *supra*, see *Richberger v. American Exp. Co.*, 73 Miss. 161, 18 So. 922 (1896); *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (1922); *Mechem, Agency* § 1960 (2d ed. 1914); *cf. note 122 supra*.

Some of the more recent decisions supporting the majority view evoked strong dissent. See the *Georgia Power Co.*, *Johnson*, and *Plotkin* cases, note 126 *supra*.

arguments for it along the line of workmen's compensation cases holding that similar injuries (to workmen) arise *out of and in the course of* their employment.¹³⁰

THE DANGEROUS INSTRUMENT DOCTRINE

Special mention should be made of a small group of cases holding the master liable for the misuse of dangerous instrumentalities committed to a servant's care. These cases have involved practical jokes by the servant on the job, with such things as railroad torpedoes, explosives, firearms, and locomotive whistles, or the use of such instrumentalities by the servant off the job.¹³¹ As in the smoking cases,¹³² some courts impose liability on a theory of the servant's negligent custody, holding the master because custody of the instrumentality is within the scope of employment.¹³³ A broader basis of liability was suggested in a leading article some 35 years ago — the foreseeability of the temptation to misuse under all the circumstances.¹³⁴ Under this reasoning, liability would be imposed only where the misuse is foreseeable. Many courts and the Agency Restatement reject the doctrine altogether.¹³⁵ Prosser would limit it to "things such as dynamite and vicious animals" so extrahazardous as to warrant strict liability on the part of the enterprise that uses them.¹³⁶

So far as practical jokes on the job go, the course of events may well leave behind the whole rule — even as most broadly conceived. As we have seen, recent cases, both in the workmen's compensation and public liability fields, have pointed out that horseplay and even violence are to be expected as incidents of the association of workmen and of their contact with the public. Where such incidents take place on the job and are engendered by the contacts and associa-

¹³⁰George v. Bekins Van & S. Co., 33 Cal.2d 834, 205 P.2d 1037 (1949); Fields v. Sanders, note 126 *supra*; Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5 (1946).

¹³¹Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 298 (1868); Alsever v. Minneapolis & St. L. R. Co., 115 Iowa 338, 88 N.W. 841 (1902) (engineer blowing off steam to frighten person); Stewart v. Cary Lumber Co., 146 N.C. 47, 59 S.E. 545 (1907) (train whistle to "make the mule dance"); Pittsburgh, C. & St. L. R. Co. v. Shields, 47 Ohio St. 387, 24 N.E. 658 (1890); Euting v. Chicago & N.W. R. Co., 116 Wis. 13, 92 N.W. 358 (1902) (torpedo). Compare Loyd v. Herrington, 178 S.W.2d 694 (Tex. Civ. App.), *reversed in* 143 Tex. 135, 182 S.W.2d 1003 (1944), noted 23 Tex. L. Rev. 83 (1944).

¹³²Notes 94-99 *supra*, and accompanying text.

¹³³See *Shields* case and the majority and dissenting opinions (in the Court of Appeals) in the *Herrington* case, both at note 131 *supra*.

¹³⁴Horack, The Dangerous Instrument Doctrine, 26 Yale L.J. 224 (1917). See also Mecham, Agency § 1945 (2d ed. 1914).

¹³⁵American Ry. Exp. Co. v. Davis, 152 Ark. 258, 238 S.W. 50 (1922); Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234 (1892); Albertson v. Boston & M.R. Co., 186 Mass. 481, 71 N.E. 980 (1904); Goupier v. Grand Trunk R. Co., 96 Vt. 191, 118 Atl. 586 (1922); Seavey, Studies in Agency 231-233 (1949); Restatement, Agency § 238, comment *d* (1934).

¹³⁶Prosser, Torts 481 (1941).

tions of the employment, they arise in the scope or course of that employment whether they involve a dangerous instrumentality or not.¹³⁷ This alone should warrant the master's vicarious liability.¹³⁸

So far as use of the instrumentality on a frolic, off the job, is concerned, the usefulness of the rule has been curtailed by denying its application to the one instrumentality that really matters much — the automobile.¹³⁹ Here some states by statute have reversed the judicial result and imposed vicarious liability in all cases where the vehicle is being used with the owner's express or implied consent.¹⁴⁰ The statutes represent sound modern policy and are more comprehensive and forthright than the crude dangerous instrument doctrine.¹⁴¹ Even where there is no such statute, the provisions of the standard non-commercial automobile liability insurance policy extend its protection to anyone driving the car with the insured's consent, thereby making any question of vicarious liability unimportant.¹⁴² With the growth of the whole scope of employment concept, and the extension of owner's consent statutes, and of liability insurance, the doctrine now under discussion is not likely to play an important role in future developments.

¹³⁷Leading compensation cases are *Hartford Acc. & Ind. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940) (assault); *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920) (horseplay). The *Leonbruno* case started the reversal—now well advanced—of an earlier trend among American cases. *Horovitz, Assaults and Horseplay under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311 (1946). Compare notes 59, 90 *supra*. Recent cases are *Dillon's Case*, 324 Mass. 102, 85 N.E.2d 69 (1949); *Myszkowski v. Wilson & Co.*, 155 Neb. 714, 53 N.W.2d 203 (1952); *Newell v. Moreau*, 94 N.H. 443, 55 A.2d 476 (1947); *Burns v. Merritt Eng. Co.*, 302 N.Y. 131, 96 N.E.2d 739 (1951).

¹³⁸An approach like this was clearly taken in *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5 (1946); *Fields v. Sanders*, 29 Cal.2d 834, 180 P.2d 684 (1947), noted 28 Ore. L. Rev. 83 (1948); *George v. Bekins Van & S. Co.*, 33 Cal.2d 834, 205 P.2d 1037 (1949). Compare *Dilli v. Johnson*, 107 F.2d 669 (D.C. Cir. 1939); *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 49 S.E.2d 363, (1948), which look in the same direction. Cf. also notes 59, 90 *supra*. It cannot be said that many courts have as yet taken this approach in third-party tort cases. See p. 190 *supra*. But with its increasing acceptance in workmen's compensation, and with increasing realization that the philosophy of vicarious liability is essentially the same as that of workmen's compensation (See p. 175 *supra*, and note) the view suggested in the text and this note seems but a rational projection of these principles in the solution of the present problem.

¹³⁹The Florida court made the lone gallant attempt to reach what is increasingly realized as a sound social result by applying the dangerous instrument concept to automobiles. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). For the general view, see cases collected in notes 16 A.L.R. 270 (1922). See also notes 81 U. of Pa. L. Rev. 60 (1932); 21 Minn. L. Rev. 823, 825 (1937); 1 U. of Fla. L. Rev. 286 (1948).

¹⁴⁰See notes 4 A.L.R. 361 (1919); 61 A.L.R. 866 (1929); 83 A.L.R. 879 (1933); 88 A.L.R. 175 (1934); 112 A.L.R. 416 (1938); 135 A.L.R. 481 (1941).

¹⁴¹See note 17 Cornell L.Q. 158 (1931); law review notes cited in note 139 *supra*.

¹⁴²See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L.J. 549, 565 (1948).

III. INDEPENDENT CONTRACTORS

There are many situations in which I am not liable for the negligence of another in the course of work I pay to have done for me. If I take a train or a taxi, or have my household goods moved over the highway by van or get a store to deliver goods I have bought, I am not liable for the negligence of the driver though he is furthering my interest. Although their liability may once have been broader,¹⁴³ employers have been generally immune from vicarious liability for the acts of their independent contractors since the early nineteenth century.¹⁴⁴

The distinction between servant and independent contractor is commonly said to turn on whether the employer has retained control or right of control over the details of the work,¹⁴⁵ or as one writer has put it whether the employer has hired services or has bought the product of those services.¹⁴⁶ The Restatement of Agency lists a number of factors to be considered "among others" in determining which is the case;¹⁴⁷ the extent of control provided for by the contract; whether the contractor is engaged in a distinct calling, and one that is not usually closely supervised in the locality; what skill is needed; who supplies the instrumentalities, tools and place of work; the length of the employment and the method of

¹⁴³Bush v. Steinman, 1 Bos. & P. 404 (C.P. 1799); cf. Lowell v. Boston & L. R. Co., 23 Pick. 24 (Mass. 1839); Stone v. Cheshire R. Co., 19 N.H. 427 (1849). While these decisions might not be different today they reason from a broader premise than do later cases.

¹⁴⁴See Deford v. State, use of Keyser, 30 Md. 179, 201 *et seq.* (1868); Davis v. Came-Wyman L. Co., 126 Tenn. 576, 150 S.W. 545, 547 (1912), for judicial accounts of the development.

The early landmark cases in England setting forth the immunity are Laughner v. Pointer, 5 B. & C. 547 (K.B. 1826), and Quarman v. Burnett, 6 M. & W. 499 (Ex. 1840) in both of which defendant was held not liable for the negligence of a hired driver.

Accounts of the development and critical treatments of the concept may be found in Douglas, Vicarious Liability and Administration of the Risk, 38 Yale L.J. 584, 594 (1929); Chapman, Liability for the Negligence of Independent Contractor, 50 L.Q. Rev. 71 (1934) (English development); Morris, Torts of an Independent Contractor, 29 Ill. L. Rev. 339 (1934); Harper, Basis of Immunity of Employees of Independent Contractor, 10 Ind. L.J. 494 (1935); Steffen, The Independent Contractor and the Good Life, 2 U. of Chi. L. Rev. 501 (1935); Smith, Collateral Negligence, 25 Minn. L. Rev. 399 (1941); Smith, Scope of the Business: The Borrowed Servant Problem, 38 Mich. L. Rev. 1222 (1940); Ferson, Liability of Employees for Misrepresentations Made by Independent Contractors, 3 Vand. L. Rev. 1 (1949); notes 19 A.L.R. 226 (1922), 20 A.L.R. 684 (1922). A valuable treatment of the subject and an exhaustive collection of New York cases may be found in Liability of Employees for the Negligence of an Independent Contractor, N.Y. Law Rev. Comm. Report, Recommendations & Studies, 411-688 (1939).

Holmes thought the employer's immunity for his contractor's acts was a limitation placed by common sense on a rule (vicarious liability) perpetuated by fiction. Holmes, Agency II, 5 Harv. L. Rev. 1, 14 *et seq.* (1891).

¹⁴⁵Restatement, Agency § 220 (1) (1934); authorities cited in note 144 *supra*; notes, 19 A.L.R. 226, 236 (1922); 75 A.L.R. 725 (1931).

¹⁴⁶Ferson, note 144 *supra*.

¹⁴⁷Restatement, Agency § 220 (2); cf. Holmes, Agency II, 5 Harv. L. Rev. 1, 15 n. 1 (1891).

payment; whether the work "is a part of the regular business of the employer"; and whether the parties regard themselves as master and servant.

None of these factors is necessarily dispositive. The parties may be at great pains to draw their contract to provide an appearance of independence, a method of compensation typically associated with a contractor (as by commission, etc.), and a lease of premises and instrumentalities to the employee. But this will not avail if the court sees a pattern of actual detailed control in the circumstances and conduct of the parties, as it often has in the case of filling station operators¹⁴⁸ and newsboys,¹⁴⁹ for instance. Nor is the distinct calling test always conclusive. While there is "no more distinct calling than that of the doctor,"¹⁵⁰ yet there is a growing tendency to hold the doctor a servant in some circumstances, as when he is a resident physician on a hospital staff.¹⁵¹ Moreover there are a good

¹⁴⁸*E.g.*, *Gulf Ref. Co. v. Brown*, 93 F.2d 870 (4th Cir. 1938); *Humble Oil & Ref. Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949), noted 2 *Baylor L. Rev.* 108; cases collected in note, 116 *A.L.R.* 457 (1938).

The cases are by no means harmonious. Compare, *e.g.*, the opinions of the courts on different levels in *Texas Co. v. Wheat*, 140 Tex. 468, 168 S.W.2d 632 (1943), reversing 159 S.W.2d 238 (Tex. Civ. App. 1942) with the majority and dissenting opinions in the *Martin* case, *supra*. The result has often been made to turn on trivial factual differences. In the typical situation briefly outlined in the text (upon which the cases are about evenly divided) the oil company is a better risk distributor and is in a better position to assume financial responsibility (if it does not wish to absorb tort liability itself), through selection of distributors, insistence on indemnity based on liability insurance, etc., than is the service station operator. It is also in a strategic position to promote accident prevention by supervision, etc. The purpose of vicarious liability would, best be served by holding the oil company liable. Comment, 38 *Mich. L. Rev.* 1063 (1940); note, 3 *Vand. L. Rev.* 597 (1950) (both collecting cases, and containing able critical analysis).

¹⁴⁹*E.g.*, *Scorpion v. American-Republican, Inc.*, 131 Conn. 42, 37 A.2d 802 (1944) (a third-party liability case); *Elder v. Aetna Cas. & S. Co.*, 149 Tex. 620, 236 S.W.2d 611 (1951) (a compensation case, collecting cases); cf. *Larson, Workmen's Compensation Law* § 44.33(b) (1952).

¹⁵⁰*Holmes, J.*, in *Pearl v. West End St. R. Co.*, 176 *Man.* 177, 57 *N.E.* 339 (1900) (company not liable for negligence of doctor it employed to examine plaintiff). Compare *Hillyer v. St. Bartholomew's Hosp.* [1909] 2 *K.B.* 820; *Schloenderff v. Soc. of N.Y. Hosp.*, 211 *N.Y.* 125, 105 *N.E.* 92 (1914) (hospital not liable for tort of house physician; *respondeat superior* inapplicable); cases collected in note, 19 *A.L.R.* 1168, 1183 (1922); *Ferson*, note 144 *supra*, at 13 *et seq.*

¹⁵¹*Gold v. Essex County Council* [1942] 2 *A.E.* 237 (C.A.); *Collins v. Hertfordshire C.C.* [1947] 1 *A.E.* 633 (K.B.); *Stuart Circle Hosp. v. Curry*, 173 *Va.* 136, 3 *S.E.2d* 153 (1939); cases collected in notes, 22 *A.L.R.* 341, 346 (1923); 39 *A.L.R.* 1431, 1433 (1925); 124 *A.L.R.* 186, 190 (1940) (showing split authority). Canadian and English cases are collected in a note, 25 *Can. B. Rev.* 646 (1947).

The *A.L.R.* notes cited above deal with private noncharitable hospitals or sanatoria. The liability of charitable institutions in this country has been widely impeded by broad doctrines of immunity from vicarious liability in tort that transcend any distinctions between servant and independent contractor. See, *e.g.*, *Pres. & Director of Georgetown Hosp. v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); note, 25 *A.L.R.2d* 29 (1952) (both containing exhaustive collection of authorities). Recent cases have, however, made serious inroads upon this broader immunity in some states. See, *e.g.*, *Mallory v. Fong*, 37 *Cal.2d* 356, 231 *P.2d* 241 (1951); *Mississippi Baptist Hosp. v. Holmes*, 214 *Miss.* 906, 56 *So.2d* 709 (1951); *Sheehan v. North Country Hosp.*, 273 *N.Y.*

many callings that are equivocal like that of salesman.¹⁵² Skill tends to mark the independent contractor, yet the master mechanic or the president of a railroad is its servant while the plumber I call in to fix a leaky faucet at my home is an independent contractor. In close cases ownership of the instrumentality (*e.g.*, the salesman's automobile) will turn the decision,¹⁵³ but standing alone it is inconclusive. Method of payment is often important. If I contract with a painter to have my house painted by a certain time for a lump sum we usually intend him to work out the details so as to profit as much as he can by the job, provided he fulfills the contract's specifications. Yet wage or salary may be paid an independent contractor¹⁵⁴ and a servant may be paid by the job or by the piece.¹⁵⁵ Courts also attach importance to the fact that the contractor is

163, 7 N.E.2d 28 (1937). Such liberalizing of the broader immunity exposes the present problem. Perhaps the ultimate absurdity in meeting it has been found in New York, where the hospital is held for the ministerial acts of its doctors and nurses but not for their negligent professional conduct. Thus the decision whether a delirious patient needs sideboards to keep him from falling out of bed is professional, and the hospital is not liable for negligence in making it. *Lee v. Glens Falls Hosp.*, 265 App. Div. 607, 42 N.Y.S.2d 169 (1943), *aff'd*, 291 N.Y. 526, 50 N.E.2d 651 (1943); *Pierson v. Chas. H. Wilson Mem. Hosp.*, 273 App. Div. 348, 78 N.Y.S.2d 146 (1948). But if that decision is once made, negligence of the nurse in failing to put sideboards in place renders the hospital vicariously liable. *Ranelli v. Soc. of N.Y. Hosp.*, 295 N.Y. 850, 67 N.E.2d 257 (1946). Further dreary details of this doctrine appear in note, 25 A.L.R.2d 29, 170 *et seq.* (1952), and in Bobbé, *Tort Liability of Hospitals in New York*, 37 Cornell L.Q. 419, 432 (1952) (concluding: "Such distinctions make legal concepts meaningless.")

It is to be hoped that further American developments will hold the staff nurse and doctor to be employees of the hospital. Holmes, who emphasized the doctor's distinct calling said elsewhere that this test "is only . . . partial. It does not apply to all cases." Holmes, *Agency II*, 5 Harv. L. Rev. 1, 15 n. 1 (1891). And Baty, in his militantly conservative treatment of vicarious liability, nevertheless took the view that doctors and nurses on the "ordinary staff" of a hospital should be treated as servants (for purposes of vicarious liability). He felt that the now-discredited *Hillyer* case was "entirely inconsistent with the liability of shipowners for the negligence of their navigating officers. A shipping company's directorate are not entitled to interfere with the navigation of its vessels, any more than the governors of a hospital are entitled to interfere with the performance of operations." Baty, *Vicarious Liability* 42, 43 (1916).

¹⁵²*E.g.*, *McCraner v. Nunn*, 129 Kan. 802, 284 Pac. 603 (1930); *Westcott v. Young*, 275 Mass. 82, 175 N.E. 153 (1931); *Stockwell v. Morris*, 46 Wyo. 1, 22 P.2d 189 (1933); cases collected in notes, 17 A.L.R. 621 (1922); 29 A.L.R. 470 (1924); 54 A.L.R. 627 (1928); 107 A.L.R. 419 (1937).

As to salesmen generally, see Leidy, *Salesmen as Independent Contractors*, 28 Mich. L. Rev. 365 (1930).

¹⁵³*E.g.*, *Hall v. Sera*, 112 Conn. 291, 152 Atl. 148 (1930); *Marchand v. Russell*, 257 Mich. 96, 241 N.W. 209 (1932); *Fidelity U. L. Ins. Co. v. McGinnis*, 62 S.W.2d 186 (Tex. Civ. App., 1933); cases cited in A.L.R. notes, *supra* note 152.

¹⁵⁴*E.g.*, *Mansfield Coal Co. v. McEnery*, 91 Pa. 184 (1879). The professional nurse and the resident physician for example, are often paid thus, though they are sometimes (unfortunately) regarded as independent contractors. Compare note 151 *supra*.

¹⁵⁵*E.g.*, *Chicago, R.I., & P.R. Co. v. Bennett*, 36 Okla. 350, 128 Pac. 705 (1912); *Magnolia Petroleum Co. v. Pierce*, 132 Okl. 167, 269 Pac. 1076 (1928); *Humble Oil Ref. Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949); cases in note, 61 A.L.R. 222 (1929).

See Holmes, *Agency II*, 5 Harv. L. Rev. 1, 15 n. 1 (1891).

himself an employer of labor. As such he would ordinarily have the right to control his own employees and the details of their work on the job.¹⁵⁶ But many an independent contractor has no employees¹⁵⁷

¹⁵⁶See, e.g., *Miller v. Merritt*, 211 Pa. 127, 60 Atl. 508 (1905); *Texas Co. v. Wheat*, 140 Tex. 468, 168 S.W.2d 632 (1943); note, 20 A.L.R. 684, 768 (1922).

Where the contractor (A) does employ labor, and one of his servants (S) is temporarily engaged in performing services for B (under an arrangement between A and B), the problem of liability for S's torts is often referred to as the "borrowed servant" problem. See, e.g., Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222 (1940). This is of course only one phase of the independent contractor problem — it arises only in cases where the relationship between A and B makes them independent contractors. The tests currently in vogue turn on the questions of control of the borrowed servant and of whose business is being done by him. The trouble with these tests is that commonly both employers have a measure of control and the business of both is being done. And indeed in an occasional case the court has allowed a jury to find dual control, and both masters liable. E.g., *Siidekum v. Animal Rescue League*, 335 Pa. 408, 45 A.2d 59 (1946) (policeman driving league's automobile to pick up injured stray dog acting on behalf of both the city and the league). But this sensible result is not often reached. Most courts seek to pin liability on either A or B exclusively.

One line of restrictive cases stresses control and has worked out a formula that as long as S is furthering the business of his general employer, A (as where he is driving a truck rented, with driver, by B from A) "there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division." *Charles v. Barrett*, 233 N.Y. 127, 135 N.E. 199 (1922); *Irwin v. Klein*, 271 N.Y. 477, 3 N.E.2d 601 (1936). See also *Anderson v. Abramson*, 234 Iowa 792, 13 N.W.2d 315 (1944); *Leathers v. Dillon*, 156 Kan. 132, 131 P.2d 668 (1943); *Yonkers v. Ocean County* 130 N.J.L. 607, 33 A.2d 898 (1943); *Restatement, Agency* § 227, comment b (1934). To the extent that the control test has validity for its accident prevention value, the general employer's control is the more effective and the more subject to this kind of pressure. To this extent then, the emphasis in these cases upon it seems justified. Cf. note 169 *infra*.

In spite of the appealing simplicity of this test, there has been a marked tendency to hold the temporary employer (B) where the task being done is generally regarded as one of the normal incidents of his enterprise. Under this view the right of control is stated as having evidentiary value only, or as being a mere inference. *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221-222 (1909) ("we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control . . .") (italics added); *Fries v. United States*, 170 F.2d 726 (6th Cir. 1948); Smith, *op. cit. supra*; Brown, *Lent Servant Doctrine*, Ins. L.J. 343 (1949) (referring, p. 350, to "the rigid test required by the New York courts"). The application of this broader test is neatly illustrated by a pair of Maryland cases. In *Dippel v. Juliano*, 152 Md. 694, 137 Atl. 514 (1927), the injury was caused by a driver lent by one undertaker (H) to another (Dippel) for a funeral conducted by Dippel. Dippel was held liable. "[T]he driver . . . was in the general employment of Herwig, but . . . at that time he was not engaged in Herwig's business but was engaged in Dippel's business." And again: "where the work to be done is the borrower's work, and a part of his business, and he has the . . . authority to direct when and where and how it shall be done, and where the work is not within the scope of the general employment of the servant . . . so far as that work is concerned, he is under the control of the borrower." In *Baltimore Transit Co. v. State*, 184 Md. 250, 40 A.2d 678 (1945), defendant owned a fleet of trucks and had been renting them with driver to the City for about 20 years for use in the garbage department. Such a driver was held still in defendant's service while working on a city assignment. This defendant's business included the renting of trucks while Herwig's did not. So far as control of the driver by the borrower goes, the cases seem hardly distinguishable.

The *Dippel* case was also rested on an alternative ground (defendant's undertaking with plaintiff). Cf. *Restatement, Torts* § 429 (1934). And it may not be inconsistent with the New York rule which also required that the business of the general employer be furthered. See *Schmedes v. Deffaa*, 153 App.

and the employer of labor may himself be a servant.¹⁵⁸ The power of the contractee to end the relationship when he will, points to the employment of a servant,¹⁵⁹ but such a power exists in some of the commonest cases of independent contractor, *i.e.* the doctor and the cab driver.¹⁶⁰ Decisions on the whole tend to correspond with the way the community would look at the matter — the distinction not being esoteric — and close cases are left to the jury.¹⁶¹ Where it is shown that the tortfeasor was engaged in performing the work of another, there is a presumption that he is an employee of that person, and if the latter asserts that the relation is one of independent contractor, he has the burden of showing it.¹⁶²

Perhaps the control test has been overemphasized in judicial reasoning. We have seen how tenuous, and often fictitious, control is even in clear master and servant cases, and how its use as a justification of vicarious liability is generally associated with the felt need for finding some sort of fault in the master. We have seen too how this attempted justification falls short and how the chief warrant for vicarious liability must be found in the principle that an enterprise (and its beneficiaries) should pay for the losses caused by the risks which it creates (even without its fault). In this view the existence of a general right of control may afford an *added* subsidiary reason for holding the employer who has it (*e.g.* an admonition to care in selecting a competent or a financially re-

Div. 819, 138 N.Y. Supp. 931 (1912), *reversed* 214 N.Y. 675, 108 N.E. 1107 (1915). Yet the emphasis and the approach differ.

If a choice must be made between employers, the approach of the Maryland court presents the lesser evil.

¹⁵⁷The country doctor, the proprietor of a one-man garage, the really independent cab-driver were once familiar (if now vanishing) examples.

¹⁵⁸As in *Re Murray*, 130 Me. 181, 154 Atl. 352 (1931); *Humble Oil & Ref. Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949).

¹⁵⁹*Re Murray*, note 158 *supra*; note, 20 A.L.R. 684, 761 *et seq.* (1922).

¹⁶⁰See *Holmes, Agency II*, 5 Harv. L. Rev. 1, 15 n. 1 (1891); note 20 A.L.R. 684, 763 n. 3 (1922).

¹⁶¹See, *e.g.*, *Black Springs L. Co. v. Palmer*, 192 Ark. 1032, 96 S.W.2d 469 (1936); *Burlington v. Gray*, 22 Cal.2d 87, 137 P.2d 9 (1943); *Scorpion v. American Republican Inc.*, 131 Conn. 42, 37 A.2d 802 (1944); *Cochran v. Pinto*, 333 Mich. 91, 52 N.W.2d 611 (1952); *Siidekum v. Animal Rescue League*, 353 Pa. 408, 45 A.2d 59 (1946).

To the extent that the question may depend on the construction of a contract, the allocation of function between court and jury will be made along the same lines as in any other case where a contract is to be construed. *Braxton v. Mendelson*, 233 N.Y. 122, 135 N.E. 198 (1922).

¹⁶²*Warren v. Hale*, 203 Ark. 608, 158 S.W.2d 51 (1942); *Robinson v. George*, 16 Cal. 2d 238, 105 P.2d 914 (1940); *Evans v. Elliott*, 220 N.C. 253, 17 S.E.2d 125 (1941); *Ely v. Rice Bros.*, 26 Tenn. App. 19, 167 S.W.2d 355 (1943); *Texas Co. v. Freer*, 151 S.W.2d 907 (Tex. Civ. App. 1941); *Dishman v. Whitney*, 121 Wash. 157, 209 Pac. 12 (1922); note, 2 Baylor L. Rev. 108 (1949). But compare *Horan v. Richfield Oil Corp.*, 56 Ariz. 64, 105 P.2d 514 (1940).

sponsible contractor),¹⁶³ but its absence would scarcely justify conferring upon an entrepreneur immunity for risks of his business.

If we are looking for risks fairly allocable to an enterprise then there is much significance in the question "whether or not the work is a part of the regular business of the employer."¹⁶⁴ The real question in all independent contractor cases is whether a man may "farm out" or "lop off" some of his affairs and escape liabilities in connection with them.¹⁶⁵ No general policy forbids this. "There seems to be no compelling reason . . . why a lawyer should have to repair his own shoes, or fill his own teeth,"¹⁶⁶ or incur liability to outsiders for harm caused by the cobbler or the dentist in doing these things for him. The risk of such harm is not, of course, incidental to the practice of law. But an employer may farm out part of his enterprise. A stockbroker whose business includes communication with his customers may use the telegraph services provided by Western Union without fear of liability to the pedestrian hit by the negligent messenger in delivering the broker's telegram.

Now this privilege to farm out has its limits, as we shall presently see, but within those limits the primary question is whether the task which caused the injury was actually and in good faith farmed out to another.¹⁶⁷ It is here that the question of control comes in. As a generalization it may be said that an employer has farmed out or turned over a task to another where he has relin-

¹⁶³Compare notes 26-28 *supra* with notes 167, 170, 180 *infra*.

See authorities cited note 144 *supra*. Morris lays great stress on the admonitory function. Douglas and Seavey give it a good deal of prominence. Harper, Smith, and Steffen are inclined to minimize it.

¹⁶⁴Restatement, Agency § 220 *h* (1934).

¹⁶⁵There are other — often more effective — ways of lopping off a segment of a business so as to insulate the entrepreneurs from liability for torts arising out of that segment. See, *e.g.*, Douglas and Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L.J. 193 (1929); Steffen, *The Independent Contractor and the Good Life*, 2 U. of Chi. L. Rev. 501 (1935).

¹⁶⁶Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222, 1245 (1940).

¹⁶⁷The term "good faith" may be used appropriately here to emphasize the need for a real "lopping off" on divestiture of control. If the formal contract language vesting control in the contractor is belied by the actual conduct of the parties, for instance, the "contractor" may be found to be a servant after all. See, *e.g.*, *Coal City Mining Corporation v. Davis*, 17 Ala. App. 22, 81 So. 358 (1919); *Laffrey v. United States Gypsum Co.*, 83 Kan. 349, 111 Pac. 498 (1910); *Young v. Fosburg L. Co.*, 147 N.C. 26, 60 S.E. 654 (1908); note, 20 A.L.R. 684, 795 *et seq.* (1922); *cf.* notes 148, 149 *supra*. It has also been suggested that the "lopping off" process is not done in good faith where the task is turned over to one known to be financially irresponsible, so as to defeat liability. See, *e.g.*, *Holbrook v. Perkins*, 147 Fed. 166 (1st Cir. 1906); *Kellogg v. Payne*, 21 Iowa 575 (1866); *Lawrence v. Shipman*, 39 Conn. 586 (1873); *Teagarden v. McLaughlin*, 86 Ind. 476 (1882); Morris, *loc. cit. supra* note 144, at 344; Smith, *Scope of Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222, 1245 (1940); Steffen, *loc. cit. supra* note 144, at 505; note, 20 A.L.R. 684, 751, 795 (1922) (financial irresponsibility is a "circumstance . . . regarded as one which tends to negative the independence of the contract" citing cases); *cf.* note 180 *infra*.

quished control over it. But control is not the all important thing it is sometimes made out to be¹⁶⁸ and it is not a constant factor. The master, of course, always does have the general right of control over his employees in the sense that he can give them orders, train them, hire and fire them. But he very often lacks any effective spot control over the conduct that brings about an accident. There are many independent contractor situations in which the employer has far greater spot control over the details of the work. The case of the taxi (or the livery automobile) furnishes a ready example. To be sure the passenger-employer could not discharge the driver from his general employment with the taxi company; but if the driver is an independent, owning his own cab, the passenger can fire him from the only job he has at the time.¹⁶⁹ It seems pretty artificial to deny the passenger-employer's right of control in the latter case, yet to say that the truck owner in New York has the right of control over his driver in California. Indeed there are situations where a contractee has the legal right and duty to control the details of an operation being done for him, wherein vicarious liability will be denied. A country doctor's car, for instance, goes dead at a patient's home. The patient must go to the hospital so the doctor drives them there in the patient's own car. The patient is bound to use care to control the conduct of the driver.¹⁷⁰ And he could, if he wanted to, discharge the doctor for the way he drives the car. Yet if there is no reasonable chance to use this control so as to avoid the accident (as where the patient is too ill) the patient will not be held vicariously liable for the doctor's driving, while he would if the driver were his farm-hand.

¹⁶⁸Holmes, Agency II, 5 Harv. L. Rev. 1, 15 n. 1 (1891) (discussing the control test: "Yet there was control in the leading case of *Quarman v. Burnett*, 6 M. & W. 499 (1840), where the employee was held not to be the defendant's servant."); Steffen, *loc. cit. supra* note 144, at 506, 507 (control test "gives principal significance to the notion of *fault*," and "this principle of liability for fault fails to cover the case." It may have been when industry was infant, but now with the growth of corporate and absentee enterprise "control in any realistic sense [has] almost vanished."); Harper, *op. cit. supra* note 144, at 497, 498 ("If the fictitious control of a master over his servant is an inadequate basis for holding the master liable, it is obvious that the transfer of this fictitious control to an independent contractor will be insufficient reason for exempting the employer from liability."); Smith, Scope of Business: The Borrowed Servant Problem, 38 Mich. L. Rev. 1222, 1229 *et seq.* (1940); New York Law Revision Commission, Report, Recommendations & Studies, 629 (1939); *cf.* note 156 *supra*.

¹⁶⁹It is true that the taxi company's opportunities for careful selection and training are superior to that of the passenger who hires an independent cab. If then the admonitory function of *respondeat superior* liability were paramount, this might afford an adequate basis for distinguishing the cases. But see the articles by Harper, Smith and Steffen, *loc. cit. supra* note 144, which tend to minimize this aspect of vicarious liability.

¹⁷⁰See Harper and Kime, Duty to Control the Conduct of Another, 43 Yale L.J. 886, 888-93 (1934); James, Scope of Duty in Negligence Cases, 47 Northwestern U. L. Rev. 778, 811 (1953); *cf.* *Palmer v. Miller*, 323 Ill. App. 528, 56 N.E.2d 447 (1944).

Where a man is not engaged in enterprise, or where the task at hand is foreign to his enterprise, he may choose to do that task himself, or employ a servant to do it. But in many kinds of situations he normally turns it over to another who is in that line of business — he engages a plumber, a lawyer, a builder, or a taxi-driver as the case may be. In such situations the turning over is not inconsistent with retaining a good deal of control. However, people would regard the risks as incidental to the enterprise of the contractor and not to the activities of the man for whom the services are being performed at the moment.

Business enterprises, too, commonly farm out many tasks which may well be regarded as normal incidents to their enterprises. The case of the broker and the telegram, or that of the lawyer going to court in a taxi will illustrate this. Where the entrepreneur uses familiar existing patterns, questions seldom arise. Probably no one would ever think of suing the broker for the Western Union messenger's negligence in hitting the pedestrian, or the lawyer for the negligence of the taxi driver. Questions arise mainly where an enterprise makes regular use of individuals (*e.g.* salesmen or newsboys) or units that would ordinarily be regarded as subordinate to it (such as the filling stations of the great oil companies), in order to get something done which would ordinarily be regarded as a part of its enterprise. It is in this type of situation that courts will carefully scrutinize the question of control. It is here that the bulk of litigation occurs. And it is here that immunity for the conduct of independent contractors tends most to thwart allocation of losses to responsible enterprises, and therefore that the defense of independent contractor meets mounting disfavor.¹⁷¹

Because of this the whole immunity has become suspect and

¹⁷¹The following authorities note that the immunity is vanishing or waning: Harper, *Basis of the Immunity of an Employer of an Independent Contractor*, 10 Ind. L.J. 494, 497 (1935); Morris, *The Torts of an Independent Contractor*, 29 Ill. L. Rev. 339, 345 (1934); Seavey, *Speculations as to "Respondeat Superior,"* Harv. Leg. Essays 433, 456 (1934); Smith, *Collateral Negligence*, 25 Minn. L. Rev. 399, 404 (1941); Harper, *Law of Torts* 645, 646 (1933).

For a different point of view, see Steffen, *loc. cit. supra* note 144; Report of New York Law Rev. Comm., *op. cit. supra* note 144. The latter report gives in Appendix A, at p. 645, the results of a survey of more than 400 New York cases. In 188 of these the employer was held not liable for the negligence of the independent contractor. The other cases fell under apparent or real exceptions to the rule. (This tabulation is taken from Countryman, *Business Units I*, mimeographed materials used at Yale Law School, Spring 1953, p. 63). The conclusion of the report was "that the present tendency of the courts is to apply the recognized grounds of decision so as to achieve a 'just' result in a particular fact situation. The general rule and the exceptions thereto . . . are very broad and flexible. Properly applied, the present common law rules, as improved upon by the existing statutes, may very well afford a means of avoiding harshness in particular cases. It may be more desirable, therefore, to leave the entire situation as it exists today in the hands of the courts."

there are those who would do away with it entirely. Yet if attention is directed not to the litigated cases but to that vast number of cases in which individuals and businesses daily call upon the services of independent contractors without any thought of liability for their acts, the picture takes on a different aspect. To be sure the employers are among the beneficiaries of the enterprises they call upon, and as such may properly be required to contribute to the accident toll of the enterprise. But existing patterns of insurance, of pricing the services or other product of the enterprise, and the like, are much more likely to do this in an equitable and expedient way than is the rather crude device of vicarious liability in tort. The passengers in a bus are for the time being employers of the independent contractor bus company. Consider the implications of possible vicarious liability here for injury to a pedestrian. If the pedestrian needs further assurance of the bus company's financial responsibility, far better devices are at hand than this sort of vicarious liability.

In great areas of its operation, the independent contractor concept is completely accepted, gives rise to little or no litigation, and tends to allocate losses in what is generally regarded as a fair way to the appropriate enterprise and the one best equipped — under existing institutions — to administer these losses. And it protects other individuals and enterprises, who have often already paid their ratable share of the costs of the employed enterprise, from further liability for some of these costs.¹⁷²

Another thing should be noted here. The distinction between independent contractor and employee or servant is made in many other connections today besides in determining the employee's vicarious liability to third persons. It is, for instance, made the test for the application of workman's compensation.¹⁷³ The applicability of social security programs and labor legislation may also

¹⁷²Morris stresses another consideration as opposed to unfettered employer liability for the acts of independent contractors, viz., "the democratic value placed on opportunity for all men to make a living as they see fit." Morris, *loc. cit. supra* note 144, at 342. He argues that if employers are liable they will refuse to contract with financially irresponsible persons unless the latter meet the expense of an indemnity bond or insurance. This would discourage the small would-be contractor. Morris finds this democratic value outweighed where the work farmed out by contract is sufficiently dangerous.

¹⁷³Recent workmen's compensation cases include: *Bieluczyk v. Crown Petroleum Corp.*, 134 Conn. 461, 58 A.2d 380 (1948) (filling station operator); *Gordon v. N.Y. Life Ins. Co.*, 300 N.Y. 652, 90 N.E.2d 898 (1950) (insurance salesman); *Elder v. Aetna Cas. & S. Co.*, 149 Tex. 620, 236 S.W.2d 611 (1951) (newsboy). See also Larson, *Workmen's Compensation Law*, c. 8 (1952); *Riesenfeld and Maxwell, Modern Social Legislation* 162-165 (1950) (both of which point out the emergence of a newer — and for the most part broader — "economic dependence test" in compensation cases). See *Bowser v. State Industrial Commission*, 182 Ore. 42, 185 P.2d 891 (1947).

turn on it.¹⁷⁴ On the whole the tendency has been to resolve doubts in favor of the application of such legislation by extending the class of servant or employee at the expense of the independent contractor in close cases. And while the policies behind these various statutes and rules may not all be the same,¹⁷⁵ no lawyer will be surprised to find that these decisions have influenced each other so as to broaden the class of employees in vicarious liability cases as well.¹⁷⁶

The greatest inroad into the employer's immunity for the acts of his independent contractor has been made by exceptions and apparent exceptions to the rule of immunity. In the first place the employer will of course be held for his own wrong.¹⁷⁷ This may consist in contracting for the very condition that constitutes the tort (such as a wall encroaching on his neighbor's land).¹⁷⁸ Or it may involve negligence in selecting a contractor whom the employer should have known to be incompetent for the job.¹⁷⁹ There has been occasional suggestion that financial irresponsibility (to respond to tort claims) would amount to such incompetence,¹⁸⁰ but judicial recognition of this is scanty. The employer's negligence may also be found in a failure to exercise supervision over, or to perform, some part of the operation which he has not in fact delegated to anybody else under the contract, or which he has in fact assumed to exercise or perform.¹⁸¹ This will often include a duty to inspect

¹⁷⁴N.L.R.B. v. Hearst, 322 U.S. 111 (1944) (under National Labor Relations Act); United States v. Silk, 331 U.S. 704 (1947) (under Social Security legislation). See also Wolfe, Determination of Employer-Employee Relationships in Social Legislation, 41 Col. L. Rev. 1015 (1941); Larson, *op. cit. supra* note 173, at § 43.41; Riesenfeld and Maxwell, *op. cit. supra* note 173, at 27 *et seq.*

¹⁷⁵This is stressed in much of the material cited in notes 173 and 174 *supra*.

¹⁷⁶This may be seen in the extent to which decisions extending the employer's liability to third persons rely on workmen's compensation cases. See, e.g., Scorpion v. American Republican Inc., 131 Conn. 42, 37 A.2d 802 (1944) (newsboy case citing workmen's compensation cases on vicarious liability point); Hampton v. Macon News Printing Co., 64 Ga. App. 150, 12 S.E.2d 425 (1940) *semble*. Third-party liability and compensation precedents are used interchangeably in Elder v. Aetna Cas. & S. Co., *supra* note 174 (a newsboy compensation case).

The same cross-pollenization between third-party liability and compensation cases may be seen in the filling station operator cases. See comment, 38 Mich. L. Rev. 1063 (1940).

It should be noted that for the most part the courts purport to apply the same tests whether the problem involves tort liability or some kind of social legislation. See sources, notes 173 and 174 *supra*.

¹⁷⁷See notes 3-7 and accompanying text *supra*.

¹⁷⁸Restatement, Torts § 410.

¹⁷⁹Restatement, Torts § 411.

¹⁸⁰See, e.g., Holbrook v. Perkins, 147 Fed. 166 (1st Cir. 1906); Lawrence v. Shipman, 39 Conn. 587 (1873); Morris, n. 144 *supra*, at 344; Smith, Scope of the Business: The Borrowed Servant Problem, 38 Mich. L. Rev. 1222, 1245 (1940); Steffen, *loc. cit. supra* note 144 at 505. Cf. note 167 *supra*.

¹⁸¹If the duty is non-delegable, no separate rule such as the one in the text would be needed. Cf. note 206 *infra*. But even when the duty is delegable, the employer must perform it if he has not delegated it in fact. Thus in Hooey v. Airport Const. Co., 253 N.Y. 486, 171 N.E. 752 (1930), the general contractor on a job failed to supervise the way "green walls" were left at night by a

the finished job before accepting it.¹⁸² The employer may also be liable for allowing the work to be carried on by dangerous methods when he ought to know that such methods are being used in fact even though they are not called for by the contract.¹⁸³

There are also situations wherein the law views a person's duty as so important and so peremptory that it will be treated as non-delegable. Defendants who are under such a duty "... cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be."¹⁸⁴ Duties imposed by statute are often found to be of this kind. Thus when an Act of Parliament permitted a railroad to build a bridge over navigable water but forbade obstruction of navigation any longer than was needed for trains to pass, the railroad was held for a contractor's negligence which caused a flaw in the bridge that kept it from being opened to let the plaintiff's vessel through.¹⁸⁵ And a railroad or bus line chartered by the legislature is held liable for its lessee's negligent operation under the franchise so as to injure a passenger.¹⁸⁶ Other statutory duties that have been held non-delegable include: a railroad's duty to maintain grade crossing gates or to keep crossings themselves in safe condition;¹⁸⁷ a railroad's duty to fence;¹⁸⁸ the duty to protect a neighbor's right to lateral support;¹⁸⁹ various building

subcontractor. And since it did not appear that the subcontract called for any precautions by the subcontractor, it was held that the general contractor was liable to the workman of a third contractor who was hurt by the falling of a "green wall" left standing at night unbraced. *Cf. Haefeli v. Woodrich Eng. Co.*, 255 N.Y. 442, 175 N.E. 123 (1931); *Hanley v. Central Sav. Bk.*, 255 App. Div. 542, 8 N.Y.S.2d 371 (1938); *Restatement, Torts* § 413. *Cf. also Ruehl v. Lingerwood R.T.Co.*, 23 N.D. 6, 135 N.W. 793 (1912) where defendant contracted to have holes dug near the highway but failed to require or to make any provision for safeguards. See *Morris, loc. cit. supra* note 144, at 349, saying that here defendant was held for "his own negligence in ordering holes and not ordering safeguards."

¹⁸²*McGuire v. Hartford Brick Co.*, 131 Conn. 417, 40 A.2d 269 (1944); *Newell v. K. & D. Jewelry Co.*, 119 Conn. 332, 176 Atl. 405 (1935); *Restatement, Torts* § 412.

¹⁸³Thus in *Wright v. Tudor City Twelfth Unit, Inc.*, 276 N.Y. 303, 12 N.E.2d 307 (1938) the manager of an apartment had contracted with an independent company to clean the mats. The manager was held nevertheless when the contractor cleaned the mats on the sidewalk and caused plaintiff to fall on a soapy and slippery mat, since the manager had reason to know that this was the way his contractor regularly cleaned the mats. *Cf. Hawley v. Central Sav. Bk.*, note 181 *supra*.

¹⁸⁴*Hardaker v. Idle Dist. Council* [1896] 1 Q.B. 335, 340 (C.A.).

¹⁸⁵*Hole v. Sittingbourne & S.R. Co.*, 6 Hurl. & N. 488 (Ex. 1861).

¹⁸⁶*Dixie Stages Lines v. Anderson*, 222 Ala. 673, 134 So. 23 (1931); *Murray v. Lehigh V. R. Co.*, 66 Conn. 512, 34 Atl. 506 (1895); *Sanford v. Pawtucket St. R. Co.*, 19 R.I. 537, 35 Atl. 67 (1896). See note, 28 A.L.R. 122 (1924) (collecting cases and indicating some conflict of view on the problem).

¹⁸⁷*Boucher v. New York, N.H. & H.R. Co.*, 196 Mass. 355, 82 N.E. 15 (1907); *Choctaw, O. & W. R. Co. v. Wilkes*, 16 Okl. 384, 84 Pac. 1086 (1906).

¹⁸⁸*Rockford, R.I. & St. L. R. Co. v. Wells*, 66 Ill. 321 (1872); *Gill v. Atlantic & G.W.R. Co.*, 27 Ohio St. 240 (1875).

¹⁸⁹*Dorrity v. Rapp*, 72 N.Y. 307 (1877).

code provisions;¹⁹⁰ the duty to maintain highways in safe condition.¹⁹¹

Some common law duties are also non-delegable. Thus the landlord's duty of care to keep the common approaches in reasonable condition for several tenants,¹⁹² and the land occupier's duty of care to keep the premises reasonably safe for invitees¹⁹³ or for

¹⁹⁰*Jacoby v. Browning*, 105 Misc. 312, 173 N.Y. Supp. 7 (1918); *cf. Elias v. New Iberia*, 137 La. 691, 69 So. 141 (1915). Further citations on the problems dealt with in notes 187-190 may be found in note, 23 A.L.R. 984 (1923).

¹⁹¹See Cases collected in notes, 25 A.L.R. 426 (1923); 52 *id.* 1012 (1928); Restatement, Torts § 418.

¹⁹²*Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 143 P.2d 929 (1943); *Russo v. Watson*, 249 App. Div. 782, 292 N.Y. Supp. 249 (1936); note 162 A.L.R. 1111, 1115 (1946); Restatement, Torts § 421.

¹⁹³As to invitees, some cases proceed on the reasoning that the land-occupier's duty is non-delegable, so that he will be held vicariously for the contractor's negligence at least where that results in an unreasonably dangerous condition of the premises. *Curtis v. Kiley*, 153 Mass. 123, 26 N.E. 421 (1891); *Corrigan v. Elsinger*, 81 Minn. 42, 83 N.W. 492 (1900); *Frear v. Manchester Traction, Light & Power Co.*, 83 N.H. 64, 139 Atl. 86 (1927); *Besner v. Central Trust Co.*, 230 N.Y. 357, 130 N.E. 577 (1921), noted 31 Yale L.J. 99; *Eide v. Skerbeck*, 242 Wis. 474, 8 N.W.2d 282 (1943); notes 23 A.L.R. 984, 1009 (1923); 145 A.L.R. 962 (1943). Other cases rest liability on the occupier's own duty to supervise, inspect, etc. work done or operations carried out by the independent contractor. *Turgeon v. Connecticut Co.*, 84 Conn. 538, 80 Atl. 714 (1911); *Thornton v. Maine State Agricultural Soc.*, 97 Me. 108, 53 Atl. 979 (1902); *Kuhn v. Carlin*, 196 Md. 318, 76 A.2d 345 (1950). Many opinions draw on both lines of reasoning without apparently realizing the distinctions between them. This is true of both the *Turgeon* and *Thornton* opinions, *supra*; and see *Brown Hotel Co. v. Sizemore*, 303 Ky. 431, 197 S.W.2d 911 (1946) (not an invitee case); note, 145 A.L.R. 962, 963, 964 (1943). And indeed the evidence which shows the contractor's negligence usually suffices to show a breach of the land-occupier's own (supervisory, etc.) duty. This would not always be so, however. The concessionnaire at an amusement park may have greater knowledge or means of knowledge as to his appliances than could be expected of the proprietor of the park, and injury may be caused by a defect which the former but not the latter should have detected (as was apparently the case in *Frear v. Manchester Traction, Light & Power Co.*, *supra* note 193). The concessionnaire may have negligently set a tent-stake too far out into the midway, so that a patron of the fair trips over it before the proprietor would have been able to discover the danger. *Cf. Eide v. Skerbeck, supra*. Or the owner of the building may have contracted with a competent engineering firm to run, supervise and repair its elevators and the injury may be caused in a way which the owner's personal care could not have prevented. See, *e.g.*, *Besner v. Central Trust Co.*, *supra*; *cf. Myers v. Little Church*, 37 Wash.2d 897, 227 P.2d 165 (1951). In any of these cases the proprietor's liability will depend on whether he is held for the concessionnaire's negligence. Chief Justice Peaslee argued persuasively that since the owner or proprietor in these cases held out an invitation to plaintiff and others to use the premises (including the appliances in question) "its acts made it a sponsor for the enterprise," and it came under "the duty to use reasonable care to see that the place was safe for those who entered in pursuance of its invitation. This duty is non-delegable." And the measure of the duty is that of the concessionnaire himself, whose position the proprietor assumed by his sponsorship. *Frear v. Manchester Traction, Light & Power Co.*, *supra*. The Restatement takes this view of the occupier's duty to his invitees, so far as condition of the premises is concerned. Restatement, Torts § 422 (possessor who entrusts repair of structure to contractor subject to same liability to invitees injured by contractor's failure to repair structure "as though he had retained the making of the repairs in his own hands.")).

A still further question may arise where the contractor's negligence does not result in a dangerous condition of the premises but involves conduct which directly injures the invitee as by dropping a hammer on him. Such negligence

adjacent owners or highway travelers,¹⁹⁴ may not be avoided by the employment of independent contractors. In all these cases the employer is as liable for the conduct of the contractor as though it were his own.

Another exception to the rule of immunity (which may also be rationalized in terms of non-delegable duty, though it often is not) is made where the operation contracted for is inherently dangerous.¹⁹⁵ To bring the activity within this exception, plaintiff need not show that it is within the class of "extrahazardous activities" where defendant's liability would be strict (or "absolute") if he did the thing himself.¹⁹⁶ And clearly plaintiff need not show that the activity would cause injury even though carefully done. There are cases where the employer is held for the negligence of his contractor in causing an injury that might have been avoided by rea-

may well be regarded as collateral to the duty of care to keep the premises in safe condition. *Bernier v. Woodstock Agric. Soc.* 88 Conn. 558, 92 Atl. 160 (1914); *Hyman v. Barrett*, 224 N.Y. 436, 121 N.E. 271 (1918). On the other hand, if the job contracted for involves great enough danger to invitees, there may be a non-delegable duty to them with reference to the conduct involving such risks. *Whyte v. Idora Park Co.*, 29 Cal. App. 342, 155 Pac. 1018 (1916); *Stickel v. Riverview Sharpshooters Park Co.*, 250 Ill. 452, 95 N.E. 445 (1911); *Sciolaro v. Asch*, 198 N.Y. 77, 91 N.E. 263 (1910); *Besner v. Central Tr. Co.*, *supra*; *cf. Lineaweaver v. Wanamaker*, 299 Pa. 45, 149 Atl. 91 (1930); *Davis v. Atlanta*, 84 Ga. App. 572, 66 S.E.2d 188 (1951). See Restatement, Torts § 415, and compare §§ 413, 417.

¹⁹⁴*Goodwin v. Mason & Seabury*, 173 Iowa 546, 155 N.W. 966 (1916); *Wilkinson v. Detroit Steel & S. Wks.*, 73 Mich. 405, 41 N.W. 498 (1889); *Cork v. Blossom*, 162 Mass. 330, 38 N.E. 495 (1894); Restatement, Torts § 422.

¹⁹⁵Note, 38 Ky. L.J. 282 (1950); Restatement, Torts §§ 416, 423; note, 23 A.L.R. 1084 (1923); see treatment in Smith, *Collateral Negligence*, 25 Minn. L. Rev. 399 (1941); *cf.* note, 23 A.L.R. 1016 (1923).

Where the employer has no reason to suppose that dangerous methods will be used to do the job contracted for, liability will not be imposed on this basis. *Luthringer v. Moore*, 181 P.2d 89 (Cal. App. 1947), *aff'd*, 31 Cal.2d 489, 190 P.2d 1 (1948); *Alexander v. R. A. Sherman Sons Co.*, 86 Conn. 292, 85 Atl. 514 (1912). *But cf. Medley v. Trenton Inv. Co.*, 205 Wis. 30, 236 N.W. 713 (1931).

¹⁹⁶If an activity is of such an extrahazardous nature that defendant would be held to strict liability for its injurious consequences if he performed it himself, he cannot escape that liability by letting out the work to another. This was the situation in *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). See also *Watson v. Mississippi R.P. Co.*, 174 Iowa 23, 156 N.W. 188 (1916) (blasting).

But liability may be put on the employer for the negligent miscarriage of his contractor, under the principle stated in the text, even where neither of such parties would be liable without negligence. *Jacob Doll & Sons v. Ribetti*, 203 Fed. 593 (3d Cir. 1913) (Defendant, tenant of building abutting on sidewalk, contracted for washing of windows. Contractor's employee fell on pedestrian. Defendant's duty "not affected by the fact that the faulty conditions . . . were due to the negligence of an independent contractor . . ." "To that extent there is a limited duty of insurance, as one may call it, though not a strict duty of insurance such as exists in the class of cases governed by *Rylands v. Fletcher* . . ." The last quotation is from *Pollock*, Torts 406 [14th ed. 1939]); *Pine Bluffs Nat. Gas Co. v. Senyard*, 108 Ark. 229, 158 S.W. 1091 (1913) (contractor for work to be done in highway left unlighted piles of sand at side of road); note 23 A.L.R. 1084, 1094, 1098-1101 (1923) (pointing out some confusion in the cases on this score); Restatement, Torts § 423 comment a.

sonable care.¹⁹⁷ On the other hand it is not sufficient for plaintiff to show a situation which is merely dangerous enough so that reasonable care will require the taking of precautions.¹⁹⁸ At present the line is a ragged and irrational one somewhere between the two extremes. Several factors have been suggested as significant, but closer examination of their significance proves disappointing. Thus an operation's threat to highway travel has been thought important;¹⁹⁹ and indeed the duty of care owed to travelers with respect to adjacent premises,²⁰⁰ or work done in the highway itself,²⁰¹ may not be delegated. Nor perhaps may the obligation of care in working on a scaffold over the sidewalk.²⁰² On the other hand the duty of care in driving automobiles and trucks along the highway is fully delegable²⁰³ though this operation presents an infinitely greater threat to travelers than do premises and structures near or over the highways.

It has also been considered significant that in some cases certain definite precautions are capable of being recognized in advance.²⁰⁴ This was true in the leading case of *Bower v. Peate*²⁰⁵

¹⁹⁷As in *Pine Bluffs Nat. Gas Co. v. Senyard*, n. 196 *supra*; *Campus v. McElligott*, 122 Conn. 14, 187 Atl. 29 (1936); *Olah v. Katz*, 234 Mich. 102, 207 N.W. 892 (1926); *Rohlfs v. Weil*, 271 N.Y. 444, 3 N.E.2d 588 (1936); *Schwartz v. Merola Bros. Constr. Co.*, 290 N.Y. 145, 48 N.E.2d 299 (1943).

¹⁹⁸*Jacob v. Mosler Safe Co.*, 127 Conn. 186, 14 A.2d 736 (1940); *Millstone Corp. v. Laurel Oil Co.*, 131 Conn. 636, 41 A.2d 711 (1945); *Pickett v. Waldorf System, Inc.*, 241 Mass. 569, 136 N.E. 64 (1922).

This, of course, is the usual case where the employer is insulated from liability for negligence of his independent contractor. If an activity were deemed "inherently dangerous" (within the rule given in the text) wherever it was likely to cause injury unless carefully done, then nearly all work contracted for would be "inherently dangerous," and the employer's vicarious liability for the acts of his independent contractors well nigh complete. See note 23 A.L.R. 1084, 1088 (1923).

¹⁹⁹Restatement, Torts § 417.

²⁰⁰See note 194, *supra*.

²⁰¹*E.g.*, *Pine Bluffs Nat. Gas Co. v. Senyard*, note 196 *supra*; *Schwartz v. Merola Bros. Constr. Co.*, note 197 *supra*; note, 23 A.L.R. 1084, 1111 *et seq.* (1923). But as this note points out the cases are not uniform even on this point. *Id.* at 1118 ff.

²⁰²*Rohlfs v. Weil*, note 197 *supra*; *Richman Bros. Co. v. Miller*, 131 Ohio 424, 3 N.E.2d 360 (1936); *McHarge v. Newcomer & Co.*, 117 Tenn. 595, 100 S.W. 700 (1907); *cf.* *Jacob Doll & Sons v. Ribetti*, n. 196 *supra*. *Contra*: *Weillbacher v. J. W. Putts Co.*, 123 Md. 249, 91 Atl. 343 (1914); *Gadsden v. Craft & Co.*, 173 N.C. 418, 92 S.E. 174 (1917). *Cf.* also *Swearsky v. Stanley Dry Goods Co.*, 122 Conn. 7, 186 Atl. 556 (1936) (having show window washed from outside involves no inherent danger that sidewalk will be made slippery by soapy water); *Pickett v. Waldorf System, Inc.*, *supra* note 198 *semble*.

²⁰³The proposition is conceded by all hands. See, *e.g.*, illustrations in *Smith, Scope of the Business: The Borrowed Servant Problem*, 38 Mich. L. Rev. 1222 (1940); Restatement, Torts § 410, illustration 5, § 411, illustration 2.

²⁰⁴See analysis of *Bower v. Peate*, n. 205 *infra*, in *Morris, Torts of Independent Contractors*, 29 Ill. L. Rev. 339, 348-352 (1934); *cf.* *Smith, Collateral Negligence*, 25 Minn. L. Rev. 397 (1941).

Compare Restatement, Torts §§ 413, 416, with § 423. Compare note, 23 A.L.R. 1016 (1923) with note, 23 A.L.R. 1084.

Some of these authorities suggest a distinction between cases when the work contracted for is "inherently" or "intrinsically" dangerous and cases

where the contract called for an excavation on defendant's land adjacent to the plaintiff's, and where the precaution was the shoring up and underpinning needed to protect plaintiff's land and house.²⁰⁶ Such circumstances may be found to spell intrinsic or inherent danger; yet this may not be controlling. Surely a business that contracts for the shipping of its products with a trucking company knows that if brakes are inadequate the trucks are highly likely to do serious harm, yet it would probably not be held for the trucking contractor's failure to have good brakes.

Even where the employer's duty is non-delegable, however, and from whatever source the non-delegable duty may be derived, the employer will not be liable for negligence of the independent contractor that is "collateral" to the non-delegable duty.²⁰⁷ The owner of a building may be under a non-delegable duty to his invitees to use care to keep it reasonably safe and he will be liable for a defect negligently created or allowed to remain by a builder called in to make repairs.²⁰⁸ But he will not be liable to the invitee for the builder's negligence in dropping a tool on his head.²⁰⁹ Where the duty is non-delegable because of the inherently dangerous character of the work, conduct is "collaterally negligent" when it does not involve the risks that made the work peculiarly dangerous. Painting a sign over the sidewalk,²¹⁰ and blasting,²¹¹ are examples of inherently dangerous tasks (within this rule). Yet if the painter or blaster negligently ran over a pedestrian on the highway while bringing supplies to the job, his negligence would be collateral, and the employer would not be vicariously liable for it.²¹²

IV. VICARIOUS LIABILITY OF INFANTS

A curious wrinkle in the law of agency concerns the vicarious

where harm is to be foreseen unless specific precautions are taken. If there is a difference at all, there is at least a wide field of overlap.

²⁰⁵L.R. 1 Q.B.D. 321 (1876).

²⁰⁶Indeed defendant recognized the need of this specific precaution by requiring it in his contract. Had he failed to make such a provision, defendant might have been found negligent for the failure. See n. 181 *supra*. But under the rule in the text the general employer is held for his contractor's negligent omission to take the precautions required by the contract. *Compare* Restatement, Torts § 413 with § 416.

²⁰⁷*Hyman v. Barrett*, 224 N.Y. 436, 121 N.E. 271 (1918); *Smith, Collateral Negligence*, 25 Minn. L. Rev. 399 (1941); Restatement, Torts § 426; see *Dalton v. Angus*, 6 App. Cas. 740, 829 (H.L. 1881).

²⁰⁸See note 193 *supra*.

²⁰⁹*Hyman v. Barrett*, n. 207 *supra*; see *Bailey v. Zlotnick*, 149 F.2d 505 (D.C. Cir. 1945).

²¹⁰*Rohlf v. Weil*, 271 N.Y. 444, 3 N.E.2d 588 (1936); *cf. Jacob Doll & Sons v. Ribetti*, 203 Fed. 593 (3d Cir. 1913); notes 196, 197 *supra*. But contrast *Davis v. Whiting & Son Co.*, 201 Mass. 91, 87 N.E. 199 (1909); *Press v. Penny*, 242 Mo. 98, 145 S.W. 458 (1912).

²¹¹*Freebury v. Chicago M. & P.S. R. Co.*, 77 Wash. 464, 137 Pac. 1044 (1914); cases cited in note, 23 A.L.R. 1084, 1103, 1105, 1109 (1923).

²¹²Restatement, Torts § 426, illustration 1.

liability of infants. Some cases have assimilated the appointment of an agent or servant to contract and have held the contract by an infant void.²¹³ This rule means that a minor cannot be vicariously liable in tort, even though he is fully liable for his own personal torts.²¹⁴ Thus in *Covault v. Nevitt*,²¹⁵ the infant owner of a store was held not liable for the negligence of his janitor in opening a trapdoor in the sidewalk so as to injure a pedestrian. Plaintiff urged that the contract was not void but voidable only, and had not been avoided before the tort. The court answered that even if that were true, the repudiation of the contract avoided it *ab initio*. "The theory of voidable contracts of infants is that they may be sustained for the advantage of the minor, but that they cannot be enforced during infancy if not beneficial to the infant, and if beneficial they can be enforced only to the extent that they are beneficial."²¹⁶ The Agency Restatement rejects the premise basic to this whole line of reasoning and rests the relationship on consent rather than contract, so that an infant who has the capacity to consent may become a principal and be bound to the incidents of the relationship while it lasts, though he would be free to terminate it in spite of any contract restrictions to the contrary.²¹⁷ Moreover, courts do not now generally regard even the contracts of minors as void, but rather as voidable only. "Dicta and general statements to the contrary are no longer respectable authority."²¹⁸ And the minor's avoidance of a contract is not generally given the kind of retroactive effect involved in the Wisconsin Court's reasoning.²¹⁹ Commentators have therefore disapproved the result in these

²¹³*Palmer v. Miller*, 380 Ill. 256, 43 N.E.2d 973 (1942); *Burns v. Smith*, 29 Ind. App. 181, 64 N.E. 94 (1902); *Payette v. Fleischman*, 329 Mich. 160, 45 N.W.2d 16 (1950); *Hodge v. Feiner*, 338 Mo. 268, 90 S.W.2d 90 (1935); *Fernandez v. Lewis*, 92 S.W.2d 305 (Tex. Civ. App. 1930); *Covault v. Nevitt*, 157 Wis. 113, 146 N.W. 1115 (1914); note 102 A.L.R. 487 (1936).

²¹⁴*Bohlen, Liability in Tort of Infants and Insane Persons*, 23 Mich. L. Rev. 9 (1924); *James, Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 1, 22 (1951).

²¹⁵See note 213 *supra*.

²¹⁶157 Wis. 119, 146 N.W. 1115, 1118 (1914).

²¹⁷Restatement, Agency § 20 and comments (1934); see *Woodson v. Hare*, 244 Ala. 301, 13 So.2d 172 (1943). On similar reasoning minor automobile owners have been held vicariously liable under consent statutes. *Ridley v. Young*, 64 Cal. App.2d 503, 149 P.2d 76 (1944); *Lind v. Eddy*, 232 Iowa 1328, 6 N.W.2d 427 (1942).

²¹⁸*Casey v. Kastel*, 237 N.Y. 305, 311, 142 N.E. 671, 673 (1924); *Coursolle v. Weyerhauser*, 69 Minn. 328, 332, 72 N.W. 697, 698-9 (1897); 1 Williston, Contracts § 227A (Rev. ed. 1936).

²¹⁹Authorities in note 218 *supra*; *Gregory, Infant's Responsibility for his Agent's Torts*, 5 Wis. L. Rev. 453, 456 *et seq.* (1930); note, 44 Harv. L. Rev. 1292 (1931); *Labatt, Master and Servant* § 109 (2d ed. 1913).

cases²²⁰ though they represent the majority of the scant handful of decisions on the matter.²²¹

The problem involves a conflict between the policy behind vicarious liability and the policy to protect minors against their infirmities, such as lack of bargaining power and improvidence. The latter policy is at its weakest where it is invoked, not against those who have direct dealings with minors, but against those who are victimized innocently by the minor's enterprise.²²² If the minor's affairs are limited enough so that he carries them out himself, there is no policy to shield him from liability for his torts. It seems strange indeed that a policy of exemption should creep in as soon as he has means to push his enterprise on a larger scale.²²³ Moreover, minors who have enough substance to employ servants or agents in their affairs are in a position to, and often do insure these risks.²²⁴

Neither reason nor policy, therefore, justifies the rule of immunity. It has had, however, one beneficial by-product. We have seen how the negligence of one person (*e.g.*, the driver) may be imputed to another innocent person as contributory negligence, so as to cut off the latter's recovery against an admitted tortfeasor.²²⁵ We have also seen how such imputed contributory negligence is for

²²⁰Gregory, *loc. cit. supra* note 219; Labatt, *op. cit. supra* note 219; Wiliston, *op. cit. supra* note 218, also at § 245 n. 11.

²²¹Most of these cases are cited in note 213 *supra*. In some cases liability is imposed on the infant on a theory of personal negligence, for example, where the infant owns or has charge of the vehicle and is actually present when the accident occurs, yet negligently fails to control the driver. Such a case is *Palmer v. Miller*, wherein plaintiff recovered on retrial. 323 Ill. App. 528, 560 N.E.2d 447 (1944). Other cases where recovery on such a basis was allowed, even though the infant's immunity from vicarious liability was asserted, include *Haynie v. Johnson*, 233 Mo. App. 948, 127 S.W.2d 105 (1939); *Wilson v. Moudy*, 22 Tenn. App. 356, 123 S.W.2d 828 (1938).

In other cases where such an alternative ground of recovery also existed, the court nevertheless rested its decision also on vicarious liability, repudiating the immunity. *Carroll v. Harrison*, 49 F. Supp. 283 (W.D. Va. 1943), *aff'd*, 139 F.2d 427 (4th Cir. 1943); *Woodson v. Hare*, 244 Ala. 301, 13 So.2d 172 (1943); *Scott v. Schisler*, 107 N.J.L. 397, 153 Atl. 395 (1931), approved in 44 Harv. L. Rev. 1292 (1931).

²²²Compare the *Ridley* and *Lind* cases, note 217 *supra*, which extended to minors the vicarious statutory liability of automobile owners imposed by legislatures because of the kinds of considerations which underlie vicarious liability generally.

²²³In the *Burns* case, note 213 *supra*, the minor owned timber land. In the *Payette* case the minor owned a carpet and linoleum business which was operated by an attorney in fact for the minor's guardian *as authorized by the probate court*. In the *Covault* case the minor owned income-bearing real estate (store property). In all the other cases (in note 213), the minor owned or had charge of an automobile. *Cf.* note, 6 Ford. L. Rev. 126 (1937) ("The advent of youth into business makes necessary some relaxation of this policy" . . . to protect minors.)

²²⁴It is noteworthy that there is no reduction of premiums on liability insurance where the entrepreneur is a minor, which would mean that the benefit of this curious rule would not enure to the benefit of an insured minor at all, but would be a windfall to his insurer.

²²⁵See *James, Imputed Contributory Negligence*, 14 La. L. Rev. 340 (1954).

the most part indefensible.²²⁶ Now the notion that an infant cannot validly appoint an agent is often used to preclude the imputation of contributory negligence to him through some doctrine of agency or joint enterprise.²²⁷ This is simply another example of how two bad rules may with caprice occasionally combine to produce a good result — a result that is better than either rule alone is capable of producing. But that is a poor argument indeed against the abolition of *both* bad rules.

V. JOINT ENTERPRISE

A partnership may of course be vicariously liable for the tortious acts of its agents and employees, just as any other business unit may. Ordinarily this means that the individual partners are liable jointly and severally.²²⁸

Each partner is an agent of the partnership while he is acting within the scope of the partnership business, so that the other partners are liable for his tortious conduct.²²⁹ The existence of vicarious liability in such cases seems as fully justified as in any case; the incidence of that liability (upon the individual as well as the partnership assets) is a matter beyond the scope of this article. Also beyond the present scope are questions of when a partnership exists. Suffice it, for present purposes to note that a partnership is usually a more or less permanent and continuous arrangement for carrying on a business. Two or more persons may, however, agree to a joint venture, with sharing of profits and losses, for a single transaction or a series of transactions.²³⁰ Such a venture is treated like a partnership, so far as vicarious tort liability is concerned, although the scope of the business within which such liability operates is more circumscribed than in the case of a general partnership.

Beyond the field of partnership and joint business ventures — but by analogy to them — American courts have recently fashioned a doctrine of “joint enterprise.” This doctrine is applied almost exclusively in automobile cases, and has usually been invoked to impute the contributory negligence of the driver to a passenger-plaintiff.²³¹ It is however, theoretically available and occasionally used as a ground of vicarious liability on the part of one member of a

²²⁶*Ibid.*

²²⁷*E.g.*, *Hampel v. Detroit, G. R. & W. R. Co.*, 138 Mich. 1, 100 N.W. 1002 (1904) (no agency); *Potter v. Florida Motor Lines, Inc.*, 57 F.2d 313 (S.D. Fla. 1932) (no joint enterprise).

²²⁸*Mechem, Law of Partnership* § 312 (2d ed. 1920).

²²⁹*Id.* at § 301.

²³⁰*Mechem, The Law of Joint Adventure*, 15 Minn. L. Rev. 644 (1931); notes, 48 A.L.R. 1055 (1927); 63 A.L.R. 909 (1929); 80 A.L.R. 312 (1932); 95 A.L.R. 857 (1935).

²³¹*Weintraub, Joint Enterprise Doctrine in Automobile Law*, 16 Cornell L.Q. 320 (1931); *Rollison, “Joint Enterprise” in the Law of Imputed Negli-*

joint enterprise for the acts of another,²³² and should be examined on that basis. The requirements for joint enterprise are commonly said to be (1) a mutual interest in the purposes of the venture (usually, that is, of the trip), and (2) a mutual "right of control over other members in directing that venture."²³³ A small minority of cases have stressed the common purpose of the venture or journey without insisting on any further showing of mutual right of control.²³⁴ Thus where friends are riding together on a trip for their mutual pleasure, joint enterprise has been found.²³⁵ However, such cases are of questionable authority at best, even in their own jurisdictions.²³⁶ The modern trend is to insist more and more strictly on a further showing of a right to control the actions of the driver (or other person whose negligence is sought to be imputed).²³⁷

The mere relationship between husband and wife,²³⁸ members of the same family,²³⁹ friends,²⁴⁰ fellow employees,²⁴¹ or employer

gence, 6 Notre Dame Law. 172 (1931); notes, 48 Mich. L. Rev. 372 (1950); 1 Baylor L. Rev. 492 (1949); Prosser, Torts § 65 (1941).

I have tried elsewhere to consider the concept of joint enterprise as it affects the issue of contributory negligence. James, *loc. cit. supra* note 225.

²³²Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Strauffus v. Barclay, 147 Tex. 600, 219 S.W.2d 65 (1949); note, 1 Baylor L. Rev. 492 (1949).

²³³See, e.g., Weintraub, *loc. cit. supra* note 231, at 325; note, 48 Mich. L. Rev. 372, 373 (1950); 4 Blashfield, Cyclopedic of Automobile Law § 2494 (Perm. ed. 1946).

²³⁴Caliando v. Huck, 84 F. Supp. 598 (D. Fla. 1949), noted in 48 Mich. L. Rev. 372 (1950); Wentworth v. Waterbury, 90 Vt. 60, 96 Atl. 334 (1916); Washington & O. D. R. Co. v. Zell, 118 Va. 755, 88 S.E. 309 (1916).

²³⁵As in the *Wentworth* and *Zell* cases, note 234 *supra*.

²³⁶With the *Wentworth* case, note 234 *supra*, compare *Round v. Pike*, 102 Vt. 324, 148 Atl. 283 (1930). With the *Zell* case, note 234 *supra*, compare *MacGregor v. Bradshaw*, 193 Va. 787, 71 S.E.2d 361 (1952); *Painter v. Lingon*, 193 Va. 840, 71 S.E.2d 355 (1952).

²³⁷See sources cited notes 231-233 *supra*, and cases cited notes 238-251 *infra*.

²³⁸*Campbell v. Roanoke Coca-Cola B. Wks.* 189 F.2d 223 (4th Cir. 1951) (Virginia Law); *Arline v. Brown*, 190 F.2d 180 (5th Cir. 1951) (Fla. Law); *Greenwood v. Bridgeways, Inc.*, 243 S.W.2d 111 (Mo. App. 1951); *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948); *Jenks v. Veeder Contr. Co.*, 177 Misc. 240, 30 N.Y.S.2d 278 (1941), *aff'd on this ground*, 264 App. Div. 979, 37 N.Y.S.2d 230 (1942), 290 N.Y. 810, 50 N.E.2d 231 (1943); *Rodgers v. Saxton*, 305 Pa. 479, 158 Atl. 166 (1931); *Brubaker v. Iowa County*, 174 Wis. 574, 183 N.W. 690 (1921).

²³⁹*Edwards v. Freeman*, 34 Cal.2d 589, 212 P.2d 883 (1949); *Gardner v. Hobbs*, 69 Idaho 288, 206 P.2d 539 (1949); *Square Deal Cartage Co. v. Smith's Adm'r.*, 307 Ky. 135, 210 S.W.2d 340 (1948).

²⁴⁰*Birnbaum v. Kirchner*, 337 Ill. App. 25, 85 N.E.2d, 191 (1949); *Carnes v. Day*, 309 Ky. 163, 216 S.W.2d 901 (1949); *Allen v. Clark*, 148 Neb. 627, 28 N.W.2d 439 (1947); *Padgett v. Southern R. Co.*, 219 S.C. 353, 65 S.E.2d 297 (1951); *Fort Worth & Denver City Ry. Co. v. Looney*, 241 S.W.2d 322 (Tex. Civ. App. 1951); *MacGregor v. Bradshaw*, 193 Va. 787, 71 S.E.2d 361 (1952).

²⁴¹*Melville v. State of Maryland*, 155 F.2d 440 (4th Cir. 1946) (Md. Law); *Kocher v. Creston Transp. Co.*, 166 F.2d 680 (3d Cir. 1948) (Pa. Law); *Acosta v. Smith*, 23 So.2d 742 (La. App. 1945); *Clough v. Schwartz*, 94 N.H. 138, 48 A.2d 921 (1946); *Ford Motor Co. v. Maddin*, 124 Tex. 131, 76 S.W.2d 474 (1934). But contrast *Kirkland v. Atchison, T. & S. E. R. Co.*, 104 Kan. 388, 179 Pac. 362 (1919) (where plaintiff milk driver was instructing new driver there was joint enterprise).

and employee²⁴² will not warrant an inference of mutual right of control, even where people standing in that relationship to each other are pursuing together a common purpose and one pertaining to the relationship.²⁴³ There is no joint enterprise, for instance, when a husband drives his wife to buy a locker for their child's toys,²⁴⁴ or where they are "traveling together to Florida."²⁴⁵ Nor is there where an employer drives his employee to or from work,²⁴⁶ or where two drivers are assigned to take turns in driving a truck,²⁴⁷ or where friends make up a car pool to go to work,²⁴⁸ or go on a fishing trip together.²⁴⁹ Nor is an inference of mutual control warranted in such cases by the additional fact that the persons share expenses²⁵⁰ or take turns in driving.²⁵¹

The commonest ground for an inference of right to control the driver's conduct is the passenger's ownership of the vehicle,²⁵² or his being in charge of it,²⁵³ or a joint ownership by driver and passenger,²⁵⁴ or a joint right of possession as bailees, or the like. It is often said that where the owner is being driven in his own vehicle, he has the right to control the actions of the driver unless he has surrendered control by contract or abandoned it; and there is a rebuttable presumption against such surrender or abandonment.²⁵⁵ Probably the most oft-recurring case of this kind is that of a hus-

²⁴²Of course where an employee is driving his employer in the course of his employment, the driver's negligence will be imputed to the employer. The text refers to a case where the employer drives the employee, *e.g.*, *Johnson v. Turner*, 319 Ill. App. 265, 49 N.E.2d 297 (1943).

²⁴³This was true in most, though not all, of the cases cited notes 238-242, *supra*.

²⁴⁴As in *Greenwood v. Bridgeways, Inc.*, note 238 *supra*.

²⁴⁵As in *Jenks v. Veeder Contr. Co.*, note 238 *supra*.

²⁴⁶As in *Johnson v. Turner*, note 242 *supra*.

²⁴⁷As in the *Melville and Creston Transp. Co.* cases note 241 *supra*.

²⁴⁸As in *Allen v. Clark*, note 240 *supra*; and see *Hofrichter v. Kiewit-Condon-Cunningham*, 147 Neb. 146, 22 N.W.2d 703 (1946).

²⁴⁹As in *Coleman v. Bent*, 100 Conn. 527, 124 Atl. 224 (1924).

²⁵⁰As in *MacGregor v. Bradshaw*, note 240 *supra*; *cf.* *Adamson v. McEiner*, 12 Ga. App. 508, 77 S.E. 591 (1913). *But cf.* *Barnett v. Levy*, 213 Ill. App. 129 (1919).

²⁵¹*MacGregor v. Bradshaw*, note 240 *supra*; *Hollister v. Hines*, 150 Minn. 185, 184 N.W. 856 (1921).

²⁵²*Malone Frt. Lines v. Tutton*, 177 F.2d 901 (5th Cir. 1949) (Ala. Law); *Brooks v. Snyder*, 302 Ill. App. 432, 24 N.E.2d 55 (1939); *Crawford v. McElhinney*, 171 Iowa 606, 154 N.W. 310 (1915); *Fisch v. Waters*, 136 N.J.L. 651, 57 A.2d 471 (1948); *Gochee v. Wagner*, 257 N.Y. 344, 178 N.E. 553 (1931). See cases collected in note, 147 A.L.R. 960 (1943), dealing with the topic treated here and in the following notes.

²⁵³*Palmer v. Miller*, note 213 *supra*; *Acosta v. Smith*, 23 So.2d 742 (La. App. 1945).

²⁵⁴*Caliano v. Huck*, 84 F. Supp. 598 (N.D. Fla. 1949); *Matheny v. Central Motor Lines*, 233 N.C. 681, 65 S.E.2d 368 (1951); *Archer v. Chicago M.I.S. & P. R. Co.*, 215 Wis. 509, 255 N.W. 67 (1934).

²⁵⁵*Samson v. Aitchison* [1912] A.C. 844 (P.C.); *Brooks v. Snyder*, 302 Ill. App. 432, 24 N.E. 55 (1939); *Foley v. Hurley*, 288 Mass. 354, 193 N.E.2d (1934); *Fisch v. Waters*, 136 N.J.L. 651, 57 A.2d 471 (1948); note, 147 A.L.R. 960 (1943); *cf.* *Fox v. Kaminsky*, 239 Wis. 559, 2 N.W.2d 199 (1942) (presumption recognized but found rebutted).

band who drives his wife's car when she is with him,²⁵⁶ or a wife driving her husband's car when he rides with her.²⁵⁷ Joint enterprise has often been based on such a showing. This has ordinarily meant that an innocent spouse's recovery from a negligent third person is barred by the contributory negligence of the other spouse.²⁵⁸ Such a harsh ruling in this typical family situation has caused considerable judicial dissatisfaction. This in turn has produced a trend to modify the rule in this kind of case by (1) an increasing willingness to find exceptions to it through abandonment or surrender of control to the driver spouse²⁵⁹ and (2) an increasing unwillingness to let a finding of control be based on technical ownership in these cases.²⁶⁰ Thus where a husband has general permission to use his wife's car and he takes her along for company on an errand of his own, she has been found to be a "guest in her own automobile,"²⁶¹ having abandoned the right of control. And even where the mission serves a mutual purpose, a number of

²⁵⁶*Fisch v. Waters*, 136 N.J.L. 651, 57 A.2d 471 (1948); *Lucey v. Alden*, 44 R.I. 379, 117 Atl. 539 (1922).

²⁵⁷*Malone Frt. Lines v. Tutton*, 177 F.2d 901 (5th Cir. 1949), (husband owner "put his wife to drive" and went to sleep in the back seat, Ala. Law); *Gochee v. Wagner*, 257 N.Y. 344, 178 N.E. 553 (1931).

²⁵⁸That was the case for instance, in the cases cited in notes 256 and 257 *supra*. In *Crawford v. McElhinney*, 171 Iowa 606, 154 N.W. 310 (1915), however, the husband was held as defendant for his wife's negligent driving, when they were both in the car on a "joint enterprise."

²⁵⁹*Southern Ry. Co. v. Priester*, 289 Fed. 945 (4th Cir. 1923); *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N.W.2d 406 (1943); *Virginia Ry. C.P.Co. v. Gorsuch*, 120 Va. 655, 91 S.E. 632 (1917); *Fox v. Kaminsky*, 239 Wis. 559, 2 N.W.2d 199 (1942).

²⁶⁰*Rodgers v. Saxton*, 305 Pa. 479, 158 Atl. 166 (1931); *Painter v. Lingon*, 193 Va. 840, 71 S.E.2d 355 (1952). The situation in New York is confused. In *Potts v. Pardee*, 220 N.Y. 431, 116 N.E. 78 (1917), the negligence of a chauffeur hired by the husband was not imputed to the wife, owner of the car and riding in it when the accident happened. In *Gochee v. Wagner*, 257 N.Y. 334, 178 N.E. 553 (1931), the husband owner, riding with his wife, was barred by her negligence. In *Jenks v. Veeder Contr. Co.*, 177 Misc. 240, 30 N.Y.2d 278 (1941), *aff'd on this point*, 264 App. Div. 979, 37 N.Y.S.2d 230 (1942), 290 N.Y. 810, 50 N.E.2d 231 (1943), the wife — as owner — was not barred by her husband's negligent driving. In *Faust v. Central Greyhound Lines*, 273 App. Div. 1055, 79 N.Y.S.2d 764 (1948) a judgment for plaintiff was reversed on grounds of contributory negligence. "She [wife] was the owner of the car in which she was riding and the negligence of the driver [husband] is imputed to her." This judgment was in turn reversed by the Court of Appeals "on the ground that . . . the evidence presents questions of fact . . . as to freedom from contributory negligence, as a matter of law, which was imputed to" . . . his wife. 298 N.Y. 721, 83 N.E.2d 138 (1948). These cases leave it unclear whether the *Gochee* decision still stands. The majority in the *Faust* case did not expressly overrule it. The minority thought the decisions fatally inconsistent. A possible distinction between them might lurk in the notion that the husband is head of the family, and so has more control when riding as a passenger in his own car than does the wife when riding in hers. Whether this notion reflects the facts of life in modern America may be an open question. At any rate its presence in the judicial mind is suggested not only by the New York cases but also by some of the language in *Painter v. Lingon*, *supra*.

²⁶¹*Fox v. Kaminsky*, 239 Wis. 559, 566, 2 N.W.2d 199, 202 (1942). All the cases cited in note 259 *supra* are of this general type.

courts simply do not base control on technical ownership, at least where it is in the wife.²⁶²

As the Virginia court has recently said, "It is not unusual for a husband to buy a car for the use of his wife, title to which is sometimes registered in the husband's name and sometimes in the wife's name. When a husband is driving an automobile so acquired and registered, the presumption is that he is in absolute control, even though his wife is in the car with him, and in the absence of evidence to the contrary, he is solely responsible for its operation."²⁶³

The case in which driver and passenger have joint or common ownership or possession of the vehicle has sometimes been given as the classic example of the non-business joint enterprise.²⁶⁴ Yet here again where husband and wife are co-owners, there is a growing judicial reluctance to find the requisite control from that fact alone.²⁶⁵

In addition to the cases of ownership, co-ownership, and the like, a few miscellaneous combinations of circumstances have been held to afford an inference of control.²⁶⁶

AN APPRAISAL OF JOINT ENTERPRISE

If a right of control is found with the passenger, at least three possible sets of legal consequences might be attached to that finding: (1) The passenger might have the duty of care to exercise control properly. In this instance, the passenger would be liable for the driver's negligence upon a showing that he might reasonably have prevented it under the circumstances of any given case. Where there was no such chance in fact, liability could not rest on this ground.²⁶⁷ (2) The passenger might be held vicariously liable for the driver's negligence if they had a common purpose (*i.e.*, the joint enterprise situation). This would mean that the driver's negligence is charged to the passenger even though he had no chance to prevent it on this occasion. (3) The passenger might be held

²⁶²See note 260 *supra*.

²⁶³*Painter v. Lingon*, 193 Va. 840, 846, 71 S.E.2d 355, 359 (1952).

²⁶⁴See, *e.g.*, *Coleman v. Bent*, 100 Conn. 527, 124 Atl. 224, 225 (1924); *Prosser, Torts* 495 (1941).

²⁶⁵*Jenks v. Veeder Contracting Co.*, *supra* note 260; *Christensen v. Hennepin Tr. Co.*, 215 Minn. 394, 10 N.W.2d 406 (1943). *But cf.* *Matheny v. Central Motor Lines*, 233 N.C. 681, 65 S.E.2d 368 (1951); *Archer v. Chicago, M. & W. P.R. Co.*, 215 Wis. 509, 255 N.W. 67 (1934); note, 109 A.L.R. 124 (1937).

²⁶⁶See, *e.g.*, *Grubb v. Illinois Term. Co.*, 366 Ill. 330, 8 N.E.2d 934 (1937) (three sisters sharing expenses of trip to buy furnishings for their home in car belonging to one of them and driven by another); *Acosta v. Smith*, 23 So.2d 742 (La. App. 1945) (employee-driver who let friend drive barred by latter's negligence in suit against third party).

²⁶⁷See, *e.g.*, *Southern R. Co. v. Priest*, 289 Fed. 945 (4th Cir. 1923); *cf.* notes 25, 63, 64, 70 *supra*.

vicariously liable on the basis of his right to control without regard to a common purpose.

Probably all courts would impose liability on the first ground if the requisite showing is made. This is fully justified by the fault principle. Beyond that, most courts would also impose liability on the second basis, and some would do so on the third. This is genuine vicarious liability and cannot therefore be justified on the principle of personal fault. It demands justification from policy. Right of control is no better justification here than it is in any other case of vicarious liability. Indeed it is weaker in this situation than in most, for the kind of control typically found in joint enterprise is not the kind that can be implemented by testing and selection based on it, by training programs for employees, by the careful working out of safety rules and methods, and the like. The kind of control ordinarily incident to a joint enterprise is not, in other words, the kind most likely to be fruitful in terms of accident prevention.

In terms of loss shifting and distribution, the joint enterprise doctrine does not select a good risk bearer except where it puts liability on an owner of the vehicle. In other cases it puts liability on one who does not expect or make provision for it, such as a member of the driver's family. And so far as vehicle owners are concerned, the doctrine is a partial makeshift and is not much needed. It does not reach all vehicle owners, but only those who happen to be passengers in the vehicle when the accident happens (a relatively rare case). And where the non-business owner is himself financially responsible, he has today protected himself by liability insurance which is written to cover anyone driving with the owner's consent, even where the owner would have no vicarious liability for the driver's actions.²⁶⁸ Thus even in states which have no owner's consent statutes, the practical impact of the joint enterprise doctrine as a vehicle for vicarious liability is negligible. It does little good as a means of distributing accident losses, and it does much harm in preventing compensation to innocent plaintiffs through the imputation of contributory negligence. It should be discarded.

²⁶⁸Extensions of vicarious liability have been made in some states by the "family purpose" doctrine. A fuller treatment of this doctrine, and of problems posed by owners' consent statutes, might well be included here but is saved for separate treatment in connection with other problems peculiar to motor vehicles.